

No. 12927

United States
Court of Appeals
for the Ninth Circuit.

RKO RADIO PICTURES, INC., a Corporation,
Appellant,
vs.

ANN SHERIDAN,
Appellee.
and

ANN SHERIDAN,
Appellant,
vs.

RKO RADIO PICTURES, INC., a Corporation,
Appellee.

Transcript of Record

In Two Volumes

Volume I
(Pages 1 to 304)

Appeals from the United States District Court,
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, Southern
District of California, Central Division

No. 10585-C

ANN SHERIDAN,

Plaintiff,

vs.

RKO RADIO PICTURES, INC., a Delaware Cor-
poration,

Defendant.

AMENDED COMPLAINT FOR DAMAGES
FOR BREACH OF CONTRACT

For a First Cause of Action, Plaintiff Complains
and Alleges:

I.

Plaintiff is a resident and a citizen of the State
of California.

II.

At all times herein mentioned, defendant RKO
Radio Pictures, Inc., hereinafter referred to as
"RKO," or as "defendant" was, and now is, a
corporation duly organized and existing under and
by virtue of the laws of the State of Delaware and
duly licensed to do business, and doing business, in
the State of California, with its principal place of
business in said state in Los Angeles, California. [2*]

III.

The amount in controversy, exclusive of interest
and costs, is in excess of \$3,000.00.

*Page numbering appearing at foot of page of original Certified
Transcript of Record.

IV.

On or about April 29, 1949, plaintiff and defendant RKO executed a contract in writing, hereinafter sometimes referred to as the "contract," under and by virtue of the terms of which defendant employed plaintiff, and plaintiff agreed to render her services as an actress to portray the leading female role in the photoplay entitled "Carriage Entrance" to be produced by RKO. Defendant RKO agreed to pay plaintiff for plaintiff's services during the first 16 weeks of the term of said employment, or such lesser period as might constitute the term thereof, and for all rights granted and/or agreed to be granted by plaintiff to defendant under said contract, the sum of \$150,000, plus a sum equal to 10% of the net profits derived by producer (defendant RKO) and its successors and assigns from the distribution of said motion picture "Carriage Entrance" accruing during the period of 10 years from and after the first general release of said motion picture "Carirage Entrance" in the United States.

V.

The term of artist's (plaintiff) employment under the contract was to commence on such date as RKO might specify in writing, which date, however, would not be earlier than June 1, 1949, nor later than July 6, 1949. Said term was to continue after the starting date thereof until plaintiff had completed all of her services in connection with principal photography of said photoplay "Carriage Entrance."

VI.

Said contract provided in paragraph 1 thereof that plaintiff might not be required to render services unless and [3] until plaintiff had approved each and all of the following:

(a) Final shooting script of the screenplay for "Carriage Entrance."

(b) The director who would direct "Carriage Entrance."

(c) The actor who would portray the leading male role in "Carriage Entrance."

On April 29, 1949, plaintiff did approve the actor who would portray the leading male role in "Carriage Entrance"; and the director who would direct "Carriage Entrance"; and the final shooting script for the screenplay for "Carriage Entrance," which approval was delivered by plaintiff to defendant RKO in writing dated April 29, 1949.

VII.

Subsequent to April 29, 1949, defendant RKO caused the screenplay for "Carriage Entrance" which had been approved by plaintiff and by the actor named in the approval of plaintiff dated April 29, 1949, to be rewritten and revised. The rewritten and revised script for "Carriage Entrance" was subsequently submitted to the actor who had been approved by plaintiff on April 29, 1949, and said actor, plaintiff is informed and believes, refused to approve the changes made in the part to be portrayed by said actor and, therefore,

refused to proceed with his portrayal of the leading male role in "Carriage Entrance."

VIII.

Thereafter and from time to time up to and including August 16, 1949, plaintiff informed defendant RKO that plaintiff would and did approve of actors to portray the leading male role in said photoplay "Carriage Entrance." Among the actors named by plaintiff as actors of whom the plaintiff approved were the following: Franchot Tone, John Lund, Charles Boyer, Richard Conte and Robert Mitchum. Plaintiff is informed and believes, and on such information and belief alleges the fact [4] to be, that one or more of said actors was available and could have been obtained by defendant RKO to portray the leading male role in said photoplay, "Carriage Entrance."

IX.

At all times after April 29, 1949, plaintiff kept herself in readiness to perform her obligations in accordance with the terms of the contract with defendant, RKO, and ever since commencement of the term of said contract on July 6, 1949, plaintiff has been ready, able and willing to perform all of the terms of the contract to be performed by her, and plaintiff has fully performed all of the obligations of plaintiff under the contract up to and including August 17, 1949, the day on which defendant RKO purported to terminate the contract with plaintiff. Specifically and without limiting the generality of the foregoing, plaintiff

reported to the studio of defendant RKO and elsewhere as and when directed by defendant RKO to take part in conferences with the officers, executives and employees of defendant RKO in connection with said photoplay "Carriage Entrance"; at the direction and request of defendant RKO, plaintiff appeared, assisted in and took part in preparation of wardrobe for plaintiff, in the fitting of said wardrobe and in discussions concerning make-up and hairdress for plaintiff.

X.

On August 15, 1949, and again on August 16, 1949, plaintiff met with the officers and executives of defendant RKO for the purpose of discussing the selection of an actor to portray the leading male role in the photoplay "Carriage Entrance."

At said meetings plaintiff informed defendant RKO that after the revision of the script by defendant RKO which had resulted in the refusal of Robert Young to portray the leading male role, defendant RKO had submitted Franchot Tone as an actor to portray said leading male role in the photoplay [5] "Carriage Entrance"; that plaintiff had approved Franchot Tone as the actor to portray said leading male role; that plaintiff had been informed that Franchot Tone had agreed to portray said leading male role in said photoplay "Carriage Entrance" but that defendant RKO had thereafter refused to utilize the services of Franchot Tone in said photoplay "Carriage Entrance." Plaintiff further informed defendant RKO that plaintiff

would approve Robert Mitchum to portray the leading male role in said photoplay "Carriage Entrance"; that said Robert Mitchum was an actor in the employ of defendant RKO who would be available for the rendition of his services in the photoplay "Carriage Entrance" and plaintiff thereupon requested that defendant RKO assign the said Robert Mitchum to portray the leading male role in the photoplay "Carriage Entrance." Defendant RKO refused to grant the request of plaintiff and refused to assign Robert Mitchum to portray said leading male role.

XI.

At all times herein mentioned up to and including the meetings held on August 15, 1949, and August 16, 1949, plaintiff, in good faith, stated to defendant RKO that plaintiff would cooperate and plaintiff did cooperate with defendant RKO in seeking a suitable actor to portray the leading male role in the photoplay "Carriage Entrance."

XII.

On August 17, 1949, arbitrarily and unilaterally and without further discussion with plaintiff, defendant RKO terminated the contract and notified plaintiff that defendant RKO would not utilize the services of plaintiff in said photoplay "Carriage Entrance" and would not pay plaintiff any compensation whatsoever in connection with said photoplay. Plaintiff alleges that the aforesaid act of defendant RKO in terminating the contract was wrongful, without cause, was taken in bad [6]

faith, was arbitrary and unreasonable and constitutes a breach of contract by defendant RKO. By reason of the wrongful acts and conduct of defendant RKO and by reason of the breach of the contract by defendant RKO, plaintiff has been and is damaged in the sum of \$350,000.00.

For an Alternative, Separate and Second Cause of Action, but Only in the Event Plaintiff Does Not Recover on Her First Cause of Action, Plaintiff Complains and Alleges:

I.

Plaintiff is a resident and a citizen of the State of California.

II.

At all times herein mentioned, defendant RKO Radio Pictures, Inc., hereinafter referred to as "RKO" or as "defendant," was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, duly licensed to do business, and doing business, in the State of California, with its principal place of business in said state in Los Angeles, California.

III.

The amount in controversy, exclusive of interest and costs, is in excess of \$3,000.00.

IV.

During the period of time commencing some time prior to April 29, 1949, to and including August

16, 1949, defendant RKO stated, represented and promised to plaintiff as follows:

1. That defendant RKO would produce a motion picture photoplay entitled "Carriage Entrance."

2. That defendant RKO was employing and did thereby employ plaintiff to render her services as an actress to portray the leading female role in said motion picture photoplay [7] and would pay to plaintiff for her services, during the first 16 weeks of said employment, or such lesser period as might constitute the term of employment, and for all rights granted and/or to be granted by plaintiff to defendant in connection with the production of said photoplay, the sum of \$150,000, plus a sum equal to 10% of the net profits derived by defendant RKO and its successors and assigns from the distribution of said motion picture photoplay accruing during a period of 10 years from and after the first general release of said motion picture photoplay in the United States.

3. That the term of plaintiff's employment in connection with the production of said motion picture photoplay "Carriage Entrance" would commence on the date to be specified by defendant RKO in writing, which date, however, would not be earlier than June 1, 1949, or later than July 6, 1949; said term was to continue after the starting date thereof until plaintiff had completed all of her services in connection with principal photography of said motion picture.

4. That plaintiff would not be required to render her services unless and until plaintiff had approved each and all of the following:

(a) Final shooting script of the screenplay "Carriage Entrance."

(b) The director who would direct "Carriage Entrance."

(c) The actor who would portray the leading male role in "Carriage Entrance."

V.

On April 29, 1949, plaintiff did approve the actor who would portray the leading male role in "Carriage Entrance"; and the director who would direct "Carriage Entrance"; and the final shooting script and screen play for "Carriage [8] Entrance," which approval was delivered by plaintiff to defendant RKO in writing dated April 29, 1949. Said actor so approved by plaintiff, agreed to render his services as an actor to portray the leading male role in said motion picture photoplay.

VI.

Subsequent to April 29, 1949, defendant RKO caused the screenplay for "Carriage Entrance" which had been approved by plaintiff and by the actor named in the approval of plaintiff dated April 29, 1949, to be rewritten and revised. The rewritten and revised script for "Carriage Entrance" was subsequently submitted to said actor who had been approved by plaintiff on April 29, 1949, and said actor, plaintiff is informed and believes, refused to

approve the changes made in the part to be portrayed by said actor and, therefore, refused to proceed with his portrayal of the leading male role in "Carriage Entrance."

VII.

Thereafter and from time to time up to and including August 16, 1949, plaintiff informed defendant RKO that plaintiff would and did approve of actors to portray the leading male role in "Carriage Entrance." Among the actors named by plaintiff as actors of whom plaintiff approved were the following: Franchot Tone, John Lund, Charles Boyer, Richard Conte and Robert Mitchum. Plaintiff is informed and believes, and on such information and belief alleges the fact to be, that one or more of said actors was available and could have been obtained by defendant RKO to portray the leading male role in said motion picture photoplay. At all times herein mentioned, plaintiff, in good faith, stated to defendant RKO that plaintiff would cooperate, and plaintiff did cooperate, with defendant RKO in seeking a suitable actor to portray the leading [9] male role in the motion picture photoplay "Carriage Entrance."

VIII.

On August 17, 1949, arbitrarily and unilaterally and without further discussion with plaintiff, defendant RKO notified plaintiff that defendant RKO would not utilize the services of plaintiff in said motion picture photoplay "Carriage Entrance" and

would not pay plaintiff any compensation whatsoever in connection with said motion picture photoplay.

IX.

Relying upon the hereinabove alleged statements, representations and promises of defendant RKO, at all times during said period commencing some time prior to April 29, 1949, up to and including August 16, 1949, plaintiff kept herself in readiness to render her services, and rendered services, as an actress for defendant RKO in connection with the production of the motion picture photoplay "Carriage Entrance," and plaintiff has been ready, willing and able to render her services as aforesaid in connection with the production of said motion picture photoplay and otherwise do everything necessary to be done by her, and has done everything necessary to be done by her, in connection with the production of said motion picture photoplay, except as prevented by defendant RKO. Specifically and without limiting the generality of the foregoing, plaintiff reported to the studio of defendant RKO and elsewhere as and when directed by defendant RKO to take part in conferences with the offices, executives and employees of defendant RKO in connection with said motion picture photoplay "Carriage Entrance"; and at the direction and request of defendant RKO, plaintiff appeared, assisted in, and took part in preparation of wardrobe for plaintiff, in the fitting of said wardrobe, and in discussions concerning make-up and [10] hair-dress for plaintiff, all of which things plaintiff would not have done, if plaintiff had not relied

upon the hereinabove alleged statements, representations and promises of defendant RKO and if defendant RKO had not made said statements, representations and promises.

X.

Relying upon the hereinabove alleged statements, representations and promises of defendant RKO, plaintiff refrained from entering into contracts for the rendition of her services as an actress in motion pictures during the period of time commencing April 29, 1949, and expiring 16 weeks from July 6, 1949, although plaintiff would have, and could have, entered into contracts to render her services as an actress in a motion picture during said period of time, for which plaintiff would have, and could have, received compensation in the amount at least equal to the amount defendant RKO promised to pay plaintiff for the services of plaintiff in the motion picture photoplay "Carriage Entrance."

XI.

At all times herein mentioned, up to and including August 16, 1949, defendant RKO by its conduct and by its hereinabove alleged statements, promises and representations, and with knowledge that plaintiff was relying upon its statements, representations and promises, encouraged and requested plaintiff to keep herself in readiness to render her services as an actress for defendant RKO in connection with the production of the motion picture photoplay "Carriage Entrance," to

refrain from entering into other contracts for the rendition of her services as an actress in motion pictures for the period of time commencing April 29, 1949, and expiring 16 weeks from July 6, 1949, and to render her services and do other acts necessary to prepare to render her services in said motion picture [11] photoplay, as hereinabove alleged.

XII.

With full knowledge on the part of defendant RKO of the change of position by plaintiff in reliance upon the hereinabove alleged statements, representations and promises of defendant RKO, defendant RKO has failed and refused, and did fail and refuse, to permit plaintiff to render her services as the leading female actress in the photoplay "Carriage Entrance" and defendant RKO has and did make it impossible for defendant RKO to comply with the statements, representations and promises made to plaintiff by defendant RKO, by producing a motion picture photoplay "Carriage Entrance" utilizing the services of an actress other than plaintiff in the leading female role in said motion picture photoplay.

XIII.

Plaintiff would not have refrained from entering into a contract to render her services as an actress in a motion picture photoplay other than "Carriage Entrance" during a period of 16 weeks commencing July 6, 1949, if plaintiff had not relied upon the hereinabove alleged statements, representations and

promises of defendant RKO, and if defendant RKO had not made such statements, representations and promises and had not encouraged and requested plaintiff to so refrain from entering into a contract for the rendition of her services.

XIV.

As a direct consequence of plaintiff's reliance on the statements, representations and promises of defendant RKO, and defendant RKO's failure to utilize plaintiff's services as an actress in connection with the production of the photoplay "Carriage Entrance," as hereinabove alleged, plaintiff has suffered a detriment in the sum of \$250,000.00 and has been damaged in that sum. [12]

Wherefore, plaintiff prays judgment as follows:

1. On the first cause of action, in the sum of \$350,000.00.
2. On the second cause of action, but only in the event plaintiff fails to recover on the first cause of action, in the sum of \$250,000.00.
3. For costs of suit herein and for such other relief as may be proper.

GANG, KOPP & TYRE,

By /s/ ROBERT E. KOPP,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 18, 1950. [13]

[Title of District Court and Cause.)

ANSWER AND COUNTERCLAIM

Now comes the defendant, RKO Radio Pictures, Inc., and for answer to the amended complaint herein, denies, admits and alleges as follows:

I.

Admits the allegations of paragraph I.

II.

Admits the allegations of paragraph II.

III.

Admits the allegations of paragraph III.

IV.

Answering paragraph IV, admits that on or about April 29, 1949, plaintiff and defendant made, executed and delivered a contract in writing, and alleges that attached hereto, marked Exhibit "A" and [27] hereby referred to and made a part of this answer as fully as though incorporated herein, is a full, true and correct copy of said contract. Admits all of the allegations of said paragraph IV insofar as said allegations accord with the terms and provisions of said contract, and denies each allegation of said paragraph not in accord with the terms and conditions of said contract.

V.

Answering paragraph V of said complaint, denies each and every allegation therein contained, except to the extent that said allegations are shown to be true by the said written contract hereunto annexed.

VI.

Answering paragraph VI, except to the extent that the allegations of said paragraph are in accord with the terms and conditions of said contract, defendant denies all of the allegations of paragraph VI. Alleges that on April 29, 1949, plaintiff approved, in writing, one Robert Young to portray the leading male role in "Carriage Entrance" and in and by said writing agreed that the defendant should not be obligated to assign said Robert Young to portray the leading male role in said picture, but that any other individual proposed by defendant to portray the leading male role in said picture should be subject to the approval of said plaintiff; that said Robert Young was, on said date, under contract to the defendant to render his services as a motion picture actor, but only in such role as might be approved by said Robert Young. Said Robert Young refused to portray the leading male role in said picture, and no person proposed by defendant was approved by the plaintiff to portray said role.

VII.

Answering paragraph VII, said defendant denies that the [28] plaintiff ever approved any screen play for "Carriage Entrance," other than as shown and to the extent set forth in the contract between the parties, or that said actor named in the approval of said plaintiff ever approved said screen play. Admits that said actor, on or about the 7th day of July, 1949, notified and advised defendant that he did not approve said screen play and that

he would not portray a role therein, and alleges that said actor refused to perform said role.

VIII.

Answering paragraph VIII, said defendant admits that plaintiff at different times suggested the name of Franchot Tone and the names of the other persons named in paragraph VIII were mentioned to portray the leading male role in the photoplay "Carriage Entrance," but alleges that neither Franchot Tone nor any other person suggested by plaintiff, or named in said paragraph, was ever proposed by defendant as an actor to portray the leading male role in said photoplay. Alleges that defendant from time to time proposed to plaintiff the names of actors to portray the leading role in said picture, and notified plaintiff that if she would approve one of said actors, such actor would be assigned to said role and employed by the defendant. Each and all of the persons so designated by the defendant were actors of great experience and ability and well qualified to portray said role in said picture. The plaintiff refused to approve any of said actors so proposed by defendant, and the refusal of said plaintiff to approve either or any of the persons so proposed by defendant was capricious, unwarranted, unreasonable, and without excuse or justification.

IX.

Answering paragraph IX, said defendant admits that plaintiff, at her suggestion and prior to the approval by plaintiff of any person to portray the

leading male role in said photoplay, appeared at the [29] studio of defendant and assisted and took part in the preparation of a wardrobe for the plaintiff, in the fitting of said wardrobe, and in discussions concerning make-up and hairdress for plaintiff.

Except as admitted, defendant denies each and every allegation in paragraph IX contained.

X.

Answering paragraph X, defendant admits that on August 15, 1949, and on August 16, 1949, plaintiff met with officers and executives of defendant for the purpose of discussing the selection of an actor to portray the leading male role in "Carriage Entrance" and that plaintiff stated to defendant that she would approve Franchot Tone as the actor to portray said leading male role, and alleges that defendant never proposed Franchot Tone to portray said role and refused to utilize the services of Franchot Tone or to assign him to portray said leading male role.

Except as herein admitted, defendant denies each and every allegation in said paragraph contained.

XI.

Answering paragraph XI, said defendant denies each and every allegation therein contained.

XII.

Answering paragraph XII, defendant admits that on August 17, 1949, defendant notified plaintiff that defendant would not utilize the services of plaintiff in said photoplay and would not pay her any compensation in connection therewith.

Except as herein admitted, defendant denies each and every allegation contained in said paragraph XII, and denies that plaintiff has been or is damaged by the or any wrongful or other acts or conduct, or by reason of any breach of contract by defendant or otherwise, in the sum of \$350,000.00 or any other sum or amount. [30]

For Answer to the Alternative, Separate and Second Cause of Action Set Forth in Said Complaint, Defendant Denies, Admits and Alleges as Follows:

I.

Admits the allegations of paragraph I.

II.

Admits the allegations of paragraph II.

III.

Admits the allegations of paragraph III.

IV.

Answering paragraph IV, defendant alleges that on or about the 29th day of April, 1949, plaintiff and defendant entered into a written agreement under the terms of which the defendant employed the services of the plaintiff upon the terms and conditions set forth in said written agreement, and a copy of said written agreement is annexed hereto, made a part hereof and marked Exhibit "A"; that all the statements, representations and promises made by defendant to said plaintiff were and are

incorporated in said written agreement and made a part thereof, and that no statements, representations or promises were made by defendant to plaintiff other than those set forth in said agreement.

Except to the extent that the allegations of said paragraph IV are shown to be true by the terms and provisions of said written agreement, said defendant denies each and all the allegations contained in said paragraph IV.

V.

Answering paragraph V, defendant admits that on or about April 29, 1949, plaintiff did approve one Robert Young as an actor to portray the leading male role in "Carriage Entrance"; alleges [31] that said Robert Young was then under written contract to the defendant to perform his services as an actor for defendant and that said contract provided that said Robert Young should have the approval of any role to which he might be assigned, and could not be required to perform any role of which he did not approve. Said Robert Young refused to approve the leading male role in "Carriage Entrance" or to perform his services therein.

Except as herein alleged, defendant denies each and every allegation in said paragraph V contained.

VI.

Answering paragraph VI, defendant admits that subsequent to April 29, 1949, defendant caused the screen play for "Carriage Entrance" to be rewritten and revised, and that the rewritten and revised

script for "Carriage Entrance" was subsequently submitted to said Robert Young and said Robert Young refused to portray the leading male role in "Carriage Entrance."

Except as herein admitted, defendant denies the allegations of said paragraph VI.

VII.

Answering the allegations contained in paragraph VII, defendant admits that plaintiff suggested Franchot Tone and the names of the other persons named in said paragraph were mentioned as an actor to portray the leading male role in "Carriage Entrance," but alleges that neither Franchot Tone nor any other person named in said paragraph or suggested by plaintiff was ever proposed by defendant to portray said role.

Except as hereinabove admitted, defendant denies the allegations contained in paragraph VII.

VIII.

Answering paragraph VIII, admits that defendant on August 17, [32] 1949, notified plaintiff that the defendant would not utilize the services of plaintiff in the motion picture photoplay "Carriage Entrance" and would not pay plaintiff any compensation whatsoever in connection with said motion picture photoplay.

Except as herein admitted, defendant denies the allegations of said paragraph VIII.

IX.

Answering the allegations of paragraph IX, de-

fendant admits that plaintiff, at her suggestion and prior to the approval by plaintiff of any person to play the leading male role in said photoplay, appeared at the studio of defendant and assisted in and took part in the preparation of the wardrobe of said plaintiff, in the fitting of said wardrobe and in discussions concerning make-up and hairdresses for the plaintiff.

Except as herein admitted, defendant denies the allegations of said paragraph IX.

X.

Answering paragraph X, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained.

XI.

Answering paragraph XI, defendant denies the allegations therein contained.

XII.

Answering paragraph XII, defendant admits that it has produced the motion picture photoplay "Carriage Entrance" and has utilized the services of an actress other than defendant in the leading female role in said motion picture photoplay.

Except as herein admitted, defendant denies the allegations of said paragraph XII.

XIII.

Answering paragraph XIII, defendant denies the allegations therein contained. [33]

XIV.

Answering paragraph XIV, defendant denies the allegations therein contained and denies that plaintiff has suffered detriment in the sum of \$250,000 or in any other amount, or has been damaged in that sum or in any other sum or amount.

For a Further, Separate and Additional Defense to the Causes of Action Set Forth in Said Complaint and to Each Thereof, Defendant Alleges:

I.

Plaintiff and defendant on April 29, 1949, made and entered into a written contract, a copy of which said contract is hereunto annexed, made a part hereof and marked Exhibit "A."

II.

Said contract, and paragraph 29 thereof, provides as follows:

"29. Producer shall not be required to use Artist's services hereunder or to complete the production of 'Carriage Entrance,' and shall be deemed to have fully performed all its obligations to Artist by paying Artist the minimum compensation payable to Artist hereunder. However, if, because Artist does not approve any one or more of the items specified in paragraph 1, Artist does not become obligated to, and does not, render any services pursuant hereto, Producer shall not be required to pay any compensation whatever to Artist hereunder."

III.

Until the termination of said contract, as hereinafter alleged, defendant duly kept and performed each and all the terms, conditions and covenants of said contract on its part to be kept and performed. [34]

IV.

On April 29, 1949, plaintiff in writing approved Robert Young as the actor to portray the leading male role in "Carriage Entrance," but such writing provided that defendant should not be obligated to assign Robert Young to said role, and that any other person proposed for said role by defendant should be subject to the approval of plaintiff. Robert Young refused to portray said role in said photoplay and had, under his contract with defendant, the right to refuse said role. Subsequent to the execution of said contract, defendant from time to time proposed to the plaintiff the names of certain persons to portray the leading male role in said photoplay. Each of the persons whose names were so submitted to said plaintiff were well known motion picture actors, and each and all of said persons were qualified, capable, talented and experienced motion picture actors and well suited for the performance of the leading male role in the photoplay "Carriage Entrance," and defendant proposed the name of each of said persons to said plaintiff in an honest and conscientious endeavor to secure the approval of plaintiff of a suitable actor to portray the leading male role in "Carriage Entrance," and in order to complete the production of said

motion picture photoplay and utilize the services of plaintiff therein.

V.

Plaintiff, without reason or justification, arbitrarily and unreasonably, refused to approve any person so proposed by defendant to perform the leading male role in the photoplay "Carriage Entrance," and on or about the 17th day of August, 1949, defendant, because of the refusal of plaintiff to approve the person to play the leading male role in said photoplay, terminated said written agreement and plaintiff never became obligated to and did not render any services pursuant to the terms of said written contract. [35]

Counterclaim

Defendant files this, its counterclaim against plaintiff, and for cause of counterclaim alleges:

I.

Defendant is, and at all times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with a place of business in the City of Los Angeles, California.

II.

Plaintiff is and at all times herein mentioned was, a resident and citizen of the State of California.

III.

The amount in controversy in this counterclaim, exclusive of interest and costs, is in excess of the sum of \$3,000.00.

IV.

On or about April 29, 1949, defendant and plaintiff made and entered into a written contract under the terms of which contract plaintiff agreed, upon the terms and conditions set forth in said contract, to perform and render services for defendant as a motion picture actress in a motion picture photoplay entitled "Carriage Entrance." A true copy of said written contract is annexed to the answer herein, marked Exhibit "A," and is hereby referred to, incorporated in and made a part of this counterclaim.

V.

At all times prior to the termination of said contract, as herein alleged, defendant duly kept and performed each and all of the terms, covenants and conditions of said contract on its part to be kept and performed.

VI.

Immediately after the execution of said contract, defendant [36] entered upon preparations for the production of said photoplay and secured and employed in the production of said photoplay, the necessary producer, writers, members of the cast, production staff, cameramen, art director and wardrobe designer, and actively engaged in and made preparations for the production of said photoplay upon the assumption that the leading female role therein would be portrayed by the plaintiff pursuant to the terms of said contract.

VII.

Defendant, after the execution of said contract

and prior to August 17, 1949, in an endeavor to secure the approval of plaintiff of an actor to portray the leading male role in said photoplay, from time to time proposed to plaintiff the names of a number of motion picture actors. Each of the persons whose name was so proposed by defendant to plaintiff was a well known, capable, talented and experienced motion picture actor, and each and all of the persons whose names were so submitted were persons eminently qualified and capable of performing in a satisfactory manner the leading male role in said photoplay, and each of said names was so proposed to plaintiff in good faith and an honest and conscientious endeavor to designate and select a person of whom the plaintiff would approve in order that the production of said photoplay might be completed.

VIII.

Plaintiff arbitrarily, capriciously, unreasonably and without cause or justification, refused and continued to refuse to approve any person proposed by the defendant to portray said leading male role, or to approve any person except such person as she might select and designate. [37]

IX.

By reason of the failure and refusal of said plaintiff to approve the actor who would portray the leading male role in said photoplay, defendant was unable to utilize the services of plaintiff in said photoplay and was compelled to and did, on the 19th day of August, 1949, terminate said written contract. In preparing to produce said photoplay and

use the services of plaintiff therein to portray the leading female role, defendant incurred costs and expenses and paid out and expended a large sum of money which it would not have paid out and expended had plaintiff in good faith cooperated with defendant in designating and selecting an actor to portray the leading male role, and had performed her services in portraying the leading female role. The amount so paid out and expended and the costs so incurred was and is the sum of \$72,686.39 in excess of the amount which defendant would have paid out, expended and incurred had plaintiff, in good faith, performed the terms and conditions of said contract on her part to be kept and performed. By reason of the wrongful, unreasonable and unjustified failure and refusal of said plaintiff to approve an actor to portray the leading male role in said photoplay, defendant has been and is damaged in the sum of \$72,686.39.

Wherefore, plaintiff prays that the plaintiff take nothing by her complaint hereunder and that defendant have and recover upon its counterclaim the sum of \$72,626.39, together with its costs of suit herein incurred.

MITCHELL, SILBERBERG &
KNUPP, and
GUY KNUPP,

By /s/ GUY KNUPP,

Attorneys for Defendant and
Counterclaimant.

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Plaintiff answers defendant's counterclaim on file herein as follows:

I.

Admits the allegations of Paragraph I of said counterclaim.

II.

Admits the allegations of Paragraph II of said counterclaim.

III.

Admits the allegations of Paragraph III of said counterclaim.

IV.

Admits the allegations of Paragraph IV of said counterclaim. [55]

V.

Denies, generally and specifically, each and every allegation contained in Paragraph V of said counterclaim.

VI.

Answering Paragraph VI of said counterclaim, plaintiff admits that immediately after the execution of said contract between plaintiff and defendant, dated April 29, 1949, defendant entered upon preparations of the production for said motion picture photoplay entitled "Carriage Entrance." Plaintiff denies that defendant secured and employed in the production of said photoplay, the necessary members of the cast and further denies that, at all times mentioned in said Paragraph VI, defendant

actively engaged in and made preparations for the production of said photoplay upon the assumption that the leading female role therein would be portrayed by the plaintiff.

VII.

Answering Paragraph VII of said counterclaim, plaintiff admits that defendant, after the execution of said contract and prior to August 17, 1949, from time to time proposed to plaintiff the names of a number of motion picture actors to portray the leading male role in said photoplay. Except as herein expressly admitted, plaintiff denies, generally and specifically, each and every allegation contained in said Paragraph VII.

VIII.

Denies, generally and specifically, each and every allegation contained in Paragraph VIII of said counterclaim.

IX.

Denies, generally and specifically, each and every allegation contained in Paragraph IX of said counterclaim.

Wherefore, plaintiff prays that defendant take nothing by its counterclaim herein, and that plaintiff [56] have and recover judgment as prayed for in her amended complaint on file herein.

GANG, KOPP & TYRE,

By /s/ MARTIN GANG,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 8, 1950. [57]

[Title of District Court and Cause.]

MEMORANDUM FOR COUNSEL

Since the court does not find itself entirely in agreement with either attorney for the plaintiff or attorney for the defendant, concerning the interpretation of the contract of April 29, 1949, this memorandum analyzing the contract is prepared for counsel and the matter will be set down for further pre-trial.

In order to test what the contract means, the court proposes to look at the contract as of definite periods of time.

1. As of April 29, 1949.

On that date the producer employed the artist as an actress for the photoplay "Carriage Entrance." (Par. 1.)

The artist accepted the employment. (Par. 3.)

(a) Suppose the artist on April 30th, had informed the producer that she was going to accept other employment. The producer would have contended that a contract existed and would have legally restrained her or sued in damages for breach of contract. [60]

(b) If the producer on April 30th had informed the artist he was not going to use her services, this would have been a breach of the contract, but Sec. 29 provided that the producer would have been deemed to have fully performed by paying the artist the "minimum" compensation payable to the artist under the contract.

In this situation the meaning of the term "mini-

minimum compensation" would be subject to interpretation and the contract would be ambiguous as to what the "minimum compensation" was, and evidence to explain the term would be admissible. As stated hereafter, the court doubts if this issue will become pertinent to the case.

2. The Agreement to Approve Script, Director and Actor.

The contract provided that the artist should not be required to render any services pursuant thereto until she had approved the script, the director and the actor. Since this term implies that the producer would submit these matters to the actress, the contract therefore means that the parties were to agree on the script, director and actor before the actress would be required to render services under the contract.

Every contract contains the implied covenant that the parties will act in good faith and so the court concludes that the agreement to agree on these three items implied that the producer would submit them in good faith and the actress would approve or disapprove in good faith.

We have, therefore, a contract which, although binding the producer and actress from April 29th, still left something to be done before the actress was to start her services. Both counsel and the court are in agreement that the issue of good faith is an issue in this case and that a [61] breach of the good faith covenant by either the producer or the actress would constitute a breach.

3. The Effect of the Notice From RKO to Sheridan on August 17, 1949.

The notice states in part, "The term of your employment under said agreement of employment commenced on July 6th, 1949." The court is in agreement that this is the legal situation under the contract except that under paragraph 12 the artist agreed to report at the producer's studio for not exceeding one week prior to the starting date of the term of employment. Depending on the facts shown at the trial the actual term of employment may have started one week prior to July 6th, 1949.

The notice states further, "By reason of your failure to approve an actor to portray the leading male role in said photoplay, we will not utilize your services in said photoplay and we will not pay you any compensation whatsoever in connection therewith."

The actress had either breached or had not breached the contract on August 17. If she had breached the contract, the producer was within his rights to excuse his own performance and to give the notice of August 17th.

If the actress had not breached the contract then the producer nevertheless had the right to elect not to use the actress' services and to fully perform by tendering her the "minimum compensation." This is not what the producer did nor is it what the producer said in the notice.

In other words, it appears to the court that the producer, on August 17th, may have elected to take

the position that the actress had breached her contract and if, in fact, she had not breached her contract, then the producer himself was guilty of an anticipatory breach by giving the [62] notice and would be liable for damages.

It does not appear to the court that the paragraph involving the payment of minimum compensation is called into play, since the producer did not rely on it and did not attempt to fully perform as he could have done by paying the "minimum compensation," but instead he elected to consider the actress as having breached the contract. The court does not see that the clause on minimum compensation is an issue and there would be no point in taking evidence on the meaning of minimum compensation, even assuming that the term is ambiguous.

4. Interpretation of Section 29.

Section 29 contains two sentences. The first sentence contains the disjunctive "or" and the second sentence contains the conjunctive "and." As to the first sentence, it would appear that depending on the facts produced at the trial the producer has used the artist's services for the week preceding the starting date of July 6th, 1949.

As to the second sentence, the "and" is pertinent because the sentence expressly provides that if the artist does not become obligated to render service because she did not approve the items in paragraph 1 and does not render any service pursuant to the contract the producer is not required to pay any compensation.

If the producer actually used or had the benefit of the actress' services (as for example, the week

preceding the formal start of employment referred to in paragraph 12), it would seem that the producer could not avail himself of the provisions of the second sentence of paragraph 29, in view of the conjunctive "and" used therein. [63] It would seem that only in those cases where the artist does not approve the items specified in paragraph 1, and does not render any services under the contract, is the producer relieved from paying compensation to the artist.

It is difficult to say whether the producer can rely on his notice of August 17th except on the proposition that the artist prior to that time had breached her contract and he would have to stand or fall on the jury's finding of that question of fact.

There is probably presented a question of fact for submission to the jury as to whether the producer waived his right to pay "minimum compensation" as full performance.

5. Interpretation of Section 21.

A breach by the actress gives the producer a right to suspend and also terminate the agreement. No compensation was to be paid during any period of suspension. Does the fact that the producer never suspended or terminated, become material on the question of fact as to whether or not there was a breach by the actress on or prior to August 17th?

Because of the court's tentative views on the matters set forth above, it is suggested that the matter be set down for further pre-trial hearing. Thursday, December 21st, would probably be a sat-

isfactory date, either in the morning or afternoon. Counsel will confer and advise the clerk if this date is satisfactory.

/s/ JAMES M. CARTER,
U. S. District Judge.

12-13-50

Copies mailed to counsel 12/13/50.

[Endorsed]: Filed December 13, 1950. [64]

[Title of District Court and Cause.]

MEMORANDUM TO COUNSEL
RE PRE-TRIAL ORDER

With reference to the matters discussed at pre-trial, the court herewith indicates its rulings so that counsel may prepare a pre-trial stipulation and order, setting forth the stipulated facts and the issues for the trial of the action:

(1) The court concludes: That paragraph 29 of the contract, and particularly the first sentence thereof, is to be interpreted so that the sentence be “* * * considered as an integral part of the whole contract,” as indicated in the language of the Lorentz case; and that in the circumstances listed in the first sentence of paragraph 29, the obligation of the studio, if any, could be liquidated by the payment of “minimum compensation”;

(2) That the second phrase in the first sentence of paragraph 29 of the contract reading, “or to

complete the [65] production of 'Carriage Entrance,'" should be read as follows: "or to complete the production of 'Carriage Entrance' with the artist." It appears to the court that both parties must have contemplated that the paragraph should have had this meaning;

(3) That the contract is not so ambiguous as to the meaning of "minimum compensation" that it becomes necessary to go outside of the four corners of the contract to ascertain the meaning of the words, "minimum compensation." The court concludes that they mean \$50,000.00;

(4) That there is in issue in the case, the question as to whether the artist is entitled to nothing under the second sentence of paragraph 29, or whether the artist is entitled to compensation for breach of contract; recovery, however, to be limited to the sum of \$50,000.00;

(5) There is in issue the question of whether the defendant is entitled to recover on its counterclaim;

(6) There is also in issue by the agreement of the parties, the question of good faith on the part of both the plaintiff and the defendant, in their actions under and concerning the contract;

(7) That the first sentence of paragraph 29 does not contain such concurrent obligations so that only by the payment of the minimum compensation can the studio avail itself of that portion of the contract;

(8) That the question of election is not in the case, since at all times the studio had a right to rely on the first sentence of paragraph 29 and to fully perform its obligations by paying minimum compensation. Since this right was available at all times, the notice of the studio, pursuant to the second sentence of paragraph 29, does not constitute such an election as would prevent the studio from concurrently or thereafter, relying on the first sentence of [66] paragraph 29.

Counsel for the plaintiff will present within seven days, a pre-trial stipulation and order, simplifying the facts and issues in this case, pursuant to the rules of this court.

Dated: January 18, 1951.

/s/ JAMES M. CARTER,
U. S. District Judge.

[Endorsed]: Filed January 18, 1951. [67]

[Title of District Court and Cause.]

PRE-TRIAL STIPULATION AND ORDER OF THE COURT

Pursuant to order of court dated January 18, 1951, there is herewith submitted a pre-trial stipulation and order for the purpose of simplifying the facts and issues in the above-entitled case.

I.

It is stipulated that the record made in the course

of pre-trial proceedings shall be deemed a part of the record made upon the trial of this cause; provided, however, that any statement upon pre-trial concerning possible settlement of the litigation or of any claim involved therein shall not, without written consent of all parties appearing, be included in any record of the pre-trial proceedings.

II.

Documents

Plaintiff and defendant hereby stipulate that [68] the following documents may be offered in evidence; that they are either originals or true and correct copies of originals which may be used in place of the originals; that each of the documents herein described and offered in evidence is genuine; that those documents which appear to be executed actually were executed by the parties and were and are valid agreements; that all letters were sent on or about the date shown thereon and were received by the addressee in due course.

1. The Contract dated April 29, 1949.

2. A letter dated April 29, 1949, signed by plaintiff, addressed to defendant. It is stipulated that this letter was executed and delivered by plaintiff to defendant contemporaneously with the execution and delivery of the Contract.

3. A letter dated June 29, 1949, from defendant to plaintiff, by Gordon E. Youngman, Vice-President.

4. A letter dated July 8, 1949, from defendant to plaintiff, by Gordon E. Youngman, Vice-President.

5. A letter dated July 11, 1949, from defendant to plaintiff, by Gordon E. Youngman, Vice-President.

6. A letter dated July 25, 1949, from defendant to plaintiff, by Gordon E. Youngman, Vice-President.

7. A letter dated August 13, 1949, from defendant to plaintiff, by Gordon E. Youngman, Vice-President, attached to which is a copy of the final budget of the motion picture "Carriage Entrance."

8. Letter of termination dated August 17, 1949, from defendant to plaintiff.

III.

Facts

The parties stipulate that the following facts [69] are true:

1. Plaintiff is a resident and a citizen of the State of California.

2. Defendant is a Delaware corporation doing business in the State of California, with its principal place of business in Los Angeles, California.

3. The amount in controversy, exclusive of interest and costs is in excess of \$3,000.00.

4. Plaintiff and defendant executed and delivered the Contract; when the Contract was exe-

cuted and delivered plaintiff had approved the following:

(a) The script for the screenplay.

(b) The director.

(c) Robert Young as the actor who would portray the leading male role in "Carriage Entrance," by a letter dated April 29, 1949, the last paragraph of which reads as follows:

"This will also confirm that I have approved and hereby approve Robert Young to portray the leading male role in 'Carriage Entrance.' You shall not be obligated to assign him to portray the leading male role in the Picture, but any other individual proposed by you to portray the leading male role in the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement."

Said letter was prepared by defendant.

5. After April 29, 1949, defendant caused the screenplay for the picture to be revised.

6. The term of employment of plaintiff under the Contract commenced July 6, 1949.

7. By letter dated July 7, 1949, defendant submitted [70] to Robert Young a screenplay entitled "Carriage Entrance" for approval as the basic story for the next Picture provided for in the employment agreement with Mr. Young dated September 13, 1945. The role proposed for Mr. Young was named therein as "Quentin Cushing" subsequently changed to "Mark Lucas." In reply thereto, by letter dated July 11, 1949, Robert Young notified defendant that

he rejected and disapproved the submitted story. Said notification was sent by registered mail addressed to defendant and received on or about July 12, 1949.

Paragraph 3 of the employment agreement of September 13, 1945, between defendant and Robert Young provides that each picture in which Robert Young appears shall be based upon an approved basic story to be submitted to Mr. Young by defendant. Such basic stories may be in the form of synopses, treatments, stories, books, plays or in any other literary form. Mr. Young agreed to notify defendant in writing within five days after submission of his approval or disapproval of the proposed story. Mr. Young agreed to exercise such right of approval reasonably and in good faith.

8. Between July 11, 1949, or shortly thereafter, up to and including August 16, 1949, plaintiff discussed with defendant proposed replacements for Robert Young as the actor to portray the leading male role in the picture.

9. By written notice dated August 17, 1949, defendant notified plaintiff that it would not utilize plaintiff's services in the picture and would not pay plaintiff any compensation whatsoever in connection therewith.

The next four statements of fact are objected to by defendant on the ground of immateriality, irrelevancy and inadmissibility and the objection of defendant has been overruled.

10. Defendant did produce the motion picture

photoplay [71] entitled "Carriage Entrance." Principal photography of said photoplay was commenced by defendant on October 3, 1949, and was completed on November 16, 1949.

11. Defendant utilized the services of Ava Gardner to portray the leading female role in the picture in place of plaintiff.

12. Defendant used Robert Mitchum as the actor to portray the leading male role in the picture.

13. Defendant has not caused the motion picture "Carriage Entrance" to be exhibited.

The following facts are stipulated to as correct, but defendant has objected to their materiality, which objection has been overruled. Said facts are offered in evidence by plaintiff in connection with the issue of defendant's good faith.

14. Defendant in 1948 negotiated with Polan Banks and a corporation controlled by Polan Banks for the financing and distribution of a motion picture to be produced by Polan Banks and a corporation controlled by him based upon the story "Carriage Entrance," starring Ann Sheridan.

15. A written agreement was entered into between Polan Bank Productions, Inc., and defendant as a result of said negotiations.

16. A dispute arose between Polan Banks Productions, Inc., and defendant, as a result of which Polan Banks Productions, Inc., commenced a law suit against defendant for breach of contract, which

was filed on or about March 25, 1949, in the Superior Court of the State of California in and for the County of Los Angeles, being number 557,544 in the files of said court.

17. Subsequently, and on or about April 29, 1949, said litigation was compromised, settled [72] and subsequently dismissed by virtue of an agreement between Polan Bank Productions, Inc., and defendant under which defendant instead of financing and distributing the picture "Carriage Entrance" acquired ownership of the literary property and entered into a contract of employment with Polan Banks to act as the producer of the motion picture for defendant and entered into the Contract dated April 29, 1949, employing Ann Sheridan to portray the leading female role in the picture.

IV.

Issues Proposed by Plaintiff and Excluded by Rulings of the Court

1. What is the meaning of the phrase "minimum compensation" in the first sentence of Paragraph 29 of the Contract?

At the trial plaintiff will question the witnesses with reference to the meaning of the phrase "minimum compensation"; objections to such questions will be made by defendant; the court will sustain defendant's objections. The plaintiff will then make an offer of proof of the evidence which would have been produced by plaintiff had the court not made its ruling.

2. Did the first sentence of Paragraph 29 of the Contract become operative?

Plaintiff contended that the first sentence of Paragraph 29 never became operative; that defendant elected not to take advantage of the provisions thereof if defendant had such right since defendant's notice of termination of August 17, 1949, was an election by defendant; that assuming defendant had the right to rely on the first sentence of Paragraph 29, defendant did not do so since defendant did not pay or offer to pay plaintiff the sum of \$50,000 or any other sum whatever.

3. On the question of damages, plaintiff contended [73] that plaintiff should be permitted to introduce evidence of damages in the amount of \$150,000.00, plus 10% of the profits which the picture would have earned if defendant had not breached the contract.

At the trial plaintiff will question the witnesses with reference to the damages sustained by plaintiff; objections to such questions will be made by defendant; the court will sustain defendant's objections. The plaintiff will then make an offer of proof of the evidence which would have been produced by plaintiff had the court not made its ruling.

V.

Rulings of Law by the Court

In connection with the foregoing matters, the court has ruled as a matter of law as follows:

1. That Paragraph 29 of the Contract, and par-

ticularly the first sentence thereof, is to be interpreted so that the sentence be considered as an integral part of the whole contract and that the obligation of defendant, if any, could be liquidated by the payment of "minimum compensation."

2. That the second phrase in the first sentence of Paragraph 29 reading, "or to complete the production of 'Carriage Entrance'" should have added to it the phrase "with the artist" and is to be read as though said phrase appeared in the Contract.

3. That the phrase "minimum compensation" as it appears in the Contract is not so ambiguous as to meaning so as to make it necessary to go outside of the four corners of the Contract to ascertain the meaning of the words and the court states as a matter of law that the phrase "minimum compensation" means \$50,000.00.

4. That defendant at all times had a right to rely [74] on the first sentence of Paragraph 29 of the Contract and to fully perform its obligations by paying "minimum compensation" and that such right was available to defendant at all times.

5. That the first sentence of Paragraph 29 of the Contract does not contain such contractual obligations so that only by the payment of the minimum compensation can the defendant avail itself of that portion of the Contract.

The court having ruled as aforesaid, it is hereby ordered that this pre-trial order and all of the matters and things set forth herein, including the

rulings of the court, and the reporter's transcript of the pre-trial proceedings, shall be made a part of the record of this trial and shall serve as a portion of the original record upon any appeal which may be taken.

This pre-trial order was prepared pursuant to the memorandum to counsel re pre-trial order dated January 18, 1951. The matters stated to be stipulated by the parties are hereby stipulated to.

Dated: January 30, 1951.

GANG, KOPP & TYRE,

By /s/ MARTIN GANG,

Attorneys for Plaintiff.

MITCHELL, SILBERBERG &
KNUPP,

By /s/ GUY KNUPP,

Attorneys for Defendant.

The foregoing pre-trial stipulation and order is hereby approved and confirmed; all orders set forth therein are hereby made by the court as of the date hereof.

Dated: January 30, 1951.

/s/ JAMES M. CARTER,

U. S. District Judge.

[Endorsed]: Filed January 30, 1951. [75]

[Title of District Court and Cause.]

PLAINTIFF'S REQUESTED INSTRUCTIONS

Plaintiff respectfully requests that the following instructions be included in the Court's charge to the jury.

GANG, KOPP & TYRE,
By /s/ MARTIN GANG,
Attorneys for Plaintiff. [76]

Plaintiff's Instruction No. 6

If you find that plaintiff is entitled to a verdict pursuant to the instructions I have given you, then you must determine the damages plaintiff has suffered as a direct and proximate result of defendant's wrongful act.

The contract provided that plaintiff was to receive two main types of compensation:

1. Flat compensation in the sum of \$150,000.00, of which \$50,000.00 was to be paid to plaintiff one week after commencement of principal photography of the motion picture "Carriage Entrance" and the balance of which, in the sum of \$100,000.00, was to be paid to plaintiff out of the "gross receipts" of the picture, as this term is defined in the agreement.

2. In addition, plaintiff was to receive 10% of the net profits of the picture.

The verdict for plaintiff should compensate her for both elements of her compensation.

You are not to be concerned with the first sentence

of paragraph 29 of the agreement between plaintiff and defendant or the meaning of "minimum compensation, but you should consider whether, from all of the evidence, the picture would have earned sufficient gross receipts so that plaintiff would have received not merely the sum of \$50,000.00 which was payable one week after commencement of principal photography of the picture "Carriage Entrance," but instead the entire flat compensation amounting to \$150,000.00. In addition, you should also estimate the probable value of plaintiff's 10% interest in the net profits of the picture assuming that such picture had been produced and distributed with plaintiff as the female star, as provided by the contract.

You need not be concerned with the fact that there is no absolute certainty as to the amount of the gross receipts which the picture would have earned if it had been produced and distributed [85] with plaintiff as the female star but you should make a just and reasonable estimate based upon all of the evidence as to whether it was probable that the picture, if so produced and distributed, would have earned sufficient gross receipts so that under the contract, plaintiff would have received the entire flat compensation of \$150,000.00.

Similarly, you must decide, based upon your just and reasonable estimate of the probable costs and earnings of such picture, if the picture would have earned net profits and if so, you must also decide how much plaintiff's 10% interest in such net profits would probably have amounted to.

The verdict for plaintiff should compensate her

for all damage she has suffered by reason of defendant's acts, including the damage based upon her flat compensation and the damage measured by her percentage interest in the net profits of the picture.

Requested by Plaintiff and

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Judge.

Bigelow v. RKO Radio Pictures,

327 U. S. 251, 66 S. Ct. 574;

Speegle v. Board of Fire Underwriters,

29 Cal. 2d 34, 172 P. 2d 867;

Pacific v. Alaska Packers Association,

138 Cal. 632; Sobelman v. Maier, 203 Cal. 1.

Plaintiff's Instruction No. 6

(Alternate)

(This instruction is requested only if plaintiff's instruction No. 6 is refused.)

If you find that plaintiff is entitled to a verdict pursuant to the instructions I have given you, then in arriving at the measure of the damages directly and proximately caused by defendant's wrongful act, you will render a verdict for plaintiff in the amount of the "minimum compensation," unless you find that defendant has waived its right to rely on the first sentence of paragraph 29 of the contract.

The word "Waiver" in law means an intentional relinquishment of a known right and you will consider whether the Notice of Termination to plaintiff dated August 17, 1949, stating that by reason of plaintiff's failure to approve an actor to portray the leading male role in the picture, defendant would not use plaintiff's services and would not pay plaintiff any compensation, constituted an intentional relinquishment on the part of the defendant of its right to "be deemed to have fully performed by paying to plaintiff the minimum compensation." If you find that defendant has waived its right to rely on this first sentence of paragraph 29, then in arriving at the damages suffered by plaintiff you will pay no consideration to paragraph 29 but you will consider what plaintiff would have received under the contract if the picture had been made with plaintiff in the leading female role.

The contract provided that plaintiff was to receive two main types of compensation:

1. Flat compensation in the sum of \$150,000.00, of which \$50,000.00 was to be paid to plaintiff one week after commencement of principal photography of the motion picture "Carriage Entrance" and the balance of which, in the sum of \$100,000.00, was to be paid to plaintiff out of the "gross receipts" of the picture, as this term is defined in the agreement. [87]

2. In addition, plaintiff was to receive 10% of the net profits of the picture.

The verdict for plaintiff should compensate her for both elements of her compensation.

If you find that defendant waived its right to rely on the first sentence of paragraph 29 of the agreement, you must consider whether, from all of the evidence, the picture would have earned sufficient gross receipts so that plaintiff would have received not merely the sum of \$50,000.00 which was payable one week after commencement of principal photography of the picture "Carriage Entrance," but instead the entire flat compensation amounting to \$150,000.00. In addition, you should also estimate the probable value of plaintiff's 10% interest in the net profits of the picture assuming that such picture had been produced and distributed with plaintiff as the female star, as provided by the contract.

You need not be concerned with the fact that there is no absolute certainty as to the amount of the gross receipts which the picture would have earned if it had been produced and distributed with plaintiff as the female star but you should make a just and reasonable estimate based upon all of the evidence as to whether it was probable that the picture, if so produced and distributed, would have earned sufficient gross receipts so that under the contract, plaintiff would have received the entire flat compensation of \$150,000.00.

Similarly, you must decide, based upon your just and reasonable estimate of the probable costs and earnings of such picture, whether the picture would have earned net profits and if so, you must also

decide how much plaintiff's 10% interest in such net profits would probably amount to.

Requested by Plaintiff and

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Judge. [88]

Overton v. Vita-Food Corp.,

94 Cal. App. 2d 367, 210 P. 2d 757;

Jones v. Maria,

48 Col. App. 171. [89]

Plaintiff's Instruction No. 6

(2nd Alternate)

(This instruction is requested only if plaintiff's instruction No. 6 is refused. If plaintiff's instruction No. 6 (Alternate is also given), this instruction is requested with the addition of the portions enclosed in parentheses.)

If you find that plaintiff is entitled to a verdict, then I instruct you that the first sentence of paragraph 29 of the contract is applicable and that your verdict for plaintiff must be in the amount of the "minimum compensation" (unless you find that defendant has waived its right to rely on the first sentence of paragraph 29, in accordance with my previous instruction to you).

I have considered this phrase and have determined that it is ambiguous and, accordingly, it is up to you to decide from all of the evidence you have heard what these words mean with reference to the provisions of the contract and particularly

whether they mean \$50,000.00, the compensation payable one week after commencement of principal photography, as contended by defendant, or whether they mean the entire flat compensation of \$150,000.00, but exclusive of the percentage compensation, as contended by plaintiff. In reaching your decision as to the meaning of the phrase "minimum compensation," you must consider the evidence presented as to the usage in the motion picture industry, the testimony as to the circumstances surrounding the execution of the contract, and in view of the evidence that the defendant undertook the employment contract with plaintiff as part of a settlement of litigation with Polan Banks and a corporation controlled by him, you must also consider the language as it was understood by plaintiff and Polan Banks, as originally negotiated.

Requested by Plaintiff and

.....,

Judge.

Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., [90]

178 F. 2d 541, (C.C.A. 9th, 1949) ;

Ross v. Pacific Mortgage Guaranty Co.,

16 Cal. App. 2d 672, 61 P. 2d 368, (1936).

Receipt of Copy acknowledged.

[Endorsed]: Filed January 30, 1951. [91]

[Title of District Court and Cause.]

JURY INSTRUCTIONS REQUESTED BY
DEFENDANT

The defendant in the above-entitled action hereby respectfully requests that the court give the following instructions to the jury: [97]

Instruction No. 1

Requested by Defendant, RKO Radio Pictures, Inc.

The plaintiff, Ann Sheridan, is a motion picture actress, and the defendant, RKO Radio Pictures, Inc., is a corporation engaged in the production and distribution of motion pictures. On April 29, 1949, the plaintiff and defendant entered into the contract which has been received in evidence under which the plaintiff agreed to render her services as an actress in the leading female role in a motion picture to be produced by the defendant entitled "Carriage Entrance" and defendant agreed to employ plaintiff as such actress. The plaintiff was not required to render any services pursuant to the contract unless and until she had approved:

(a) The final shooting script of the screen play for "Carriage Entrance."

(b) The director who would direct "Carriage Entrance."

(c) The actor who would portray the leading male role in "Carriage Entrance."

There is no dispute between the parties with respect to the approval by the plaintiff of the final shooting script of the screen play for "Carriage

Entrance" or the director who would direct the picture. This action arises from the failure of plaintiff, prior to the termination of her employment by defendant, to approve an actor to portray the leading male role.

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK:er 1-25-51 5c. [98]

Instruction No. 2

Requested by Defendant, RKO Radio Pictures, Inc.

On the same day that the contract was entered into, plaintiff in writing approved Robert Young to portray the leading male role in the picture. This writing provides that defendant need not assign Robert Young to the picture but that any other individual proposed by defendant to portray the role should be subject to the approval of plaintiff as set forth in the employment contract. Robert Young was, on April 29, 1949, required under a written contract with defendant to render his services in one motion picture to be produced by defendant and based upon a story which should be approved by Robert Young. The defendant submitted the screen play for "Carriage Entrance" to Robert Young and Young refused to approve such screen

play or to render his services in portraying the leading male role in the motion picture. Accordingly, you are instructed that the approval by plaintiff of Robert Young did not obligate her to render her services in the picture and made it necessary that defendant should propose to plaintiff some other person to play such role, and that plaintiff should approve such person before she became bound to render her services.

Given:

.....,
Judge.

Refused:

.....,
Judge.

GK:er 1/25/51 5c. [99]

Instruction No. 3

Requested by Defendant, RKO Radio Pictures, Inc.

In every contract there is an implied covenant of good faith, and in the contract between the plaintiff and defendant this implied covenant required that defendant should in good faith propose to plaintiff for the leading role in the picture, the names of actors who were competent and qualified to portray such role, and with the intent on the part of defendant to assign to the role any one of such actors who was approved by plaintiff and on the part of plaintiff, the implied covenant was that in refusing to approve any person that defendant

proposed plaintiff would not act arbitrarily or capriciously, but would base such refusal upon some reasonable and sensible objection.

Universal v. California Press,

20 Cal. (2d) 751;

Nelson v. Abrahams,

29 C. (2d) 745.

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK :er 1/25/51 5 c. [100]

Instruction No. 4

Requested by Defendant, RKO Radio Pictures, Inc.

The plaintiff had no right or voice in the selection of an actor to portray the leading male role in the picture. She could only approve or disapprove any actor selected by the defendant. The matter of selection of an actor for the role was exclusively the right of defendant and the defendant fully complied with its obligation under the contract if it proposed, in good faith, to assign to the role a competent and qualified actor of recognized standing and reputation in the motion picture industry and one suited for the leading male role in the picture. It is not material that defendant did not actually assign any actor to portray the leading male if the plaintiff by her statements or conduct plainly

indicated that she would not approve such actor if he were assigned to the role.

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK:er 5 c. 1-24-51. [101]

Instruction No. 5

Requested by Defendant, RKO Radio Pictures, Inc.

The contract between the plaintiff and the defendant provides that if because the plaintiff does not approve an actor to portray the leading male role in the picture the plaintiff does not become obligated to and does not render any services pursuant to the contract, the defendant shall not be required to pay any compensation to the plaintiff. Therefore, if the defendant did in good faith propose any actor to portray such role and plaintiff did not approve such action, defendant was entitled to terminate the contract of employment without paying any compensation to plaintiff.

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK:er 1-25-51 5 c. [102]

Instruction No. 6

Requested by Defendant, RKO Radio Pictures, Inc.

The contract between the plaintiff and the defendant provides that if the plaintiff does not approve an actor to portray the leading male role in the picture, the plaintiff does not become obligated to render any services pursuant to the contract. Therefore, if the defendant did in good faith propose any actor to portray such role and plaintiff did not approve such actor, the plaintiff never became obligated to render any services pursuant to the contract.

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK :er 1-31-51 5 c. [103]

Instruction No. 7

Requested by Defendant, RKO Radio Pictures, Inc.

If you find that the defendant did in good faith propose any actor to portray the leading male role in the picture and plaintiff did not approve such actor, the plaintiff never became obligated to render any services pursuant to the contract. Therefore, any services she might have performed could not

have been pursuant to the contract and the plaintiff is not entitled to be compensated for them.

Given:

.....,
Judge.

Refused:

.....,
Judge.

GK:er 1-25-51 5 c. [104]

Instruction No. 8

Requested by Defendant, RKO Radio Pictures, Inc.

Defendant was under no obligation to propose more than one actor for the leading male role in the picture if such actor was, in the honest judgment of the defendant, qualified for the performance of such role. Having proposed such an actor, defendant was entitled to insist that plaintiff either approve or disapprove such selection by defendant, and if plaintiff disapproved such proposal, defendant might have terminated the contract of employment of plaintiff without incurring any liability to plaintiff.

Given:

.....,
Judge.

Refused:

.....,
Judge.

GK:er 1-25-51 5 c. [105]

Instruction No. 9

Requested by Defendant, RKO Radio Pictures, Inc.

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the "burden of proof" as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue.

Given:

.....,

Judge.

Refused:

.....,

Judge. [106]

Instruction No. 10

Requested by Defendant, RKO Radio Pictures, Inc.

If you find that defendant did not breach its contract in terminating the employment of plaintiff,

you should next consider whether plaintiff, acting in good faith, refused to approve the name of any one of the actors proposed by defendant for the leading male role in the picture. Unless you find from a preponderance of the evidence that plaintiff did refuse to approve any one of the actors so proposed, and unless you also find that plaintiff did not act in good faith in such refusal, plaintiff did not breach her contract by such refusal and defendant cannot recover on its counterclaim.

Given:

.....,
Judge.

Refused:

.....,
Judge.

GK:er 5 c. 1-25-51. [107]

Instruction No. 11

Requested by Defendant, RKO Radio Pictures, Inc.

If you find that defendant did not breach its contract with plaintiff by terminating such contract as and when it did, and that plaintiff did not breach the contract with defendant by refusing to approve an actor proposed for the leading male role in the picture, neither plaintiff nor defendant can recover in this action and your verdict should be for nothing in favor of either party. If you find that defendant breached its contract by terminating the contract of employment and plaintiff is entitled to recover in this action, your verdict should be in her

favor for the sum of \$50,000. If you find that plaintiff breached her contract, your verdict should be for the defendant on its counterclaim in such amount as will compensate defendant for the loss or damage, if any, suffered by defendant by the refusal of plaintiff to approve an actor for the leading male role in "Carriage Entrance."

Given:

.....,

Judge.

Refused:

.....,

Judge.

GK:er 1-25-51 5 c. [108]

Instruction No. 12

Requested by Defendant, RKO Radio Pictures, Inc.

The burden of proof with respect to the allegations of the complaint is on the plaintiff, and plaintiff in order to recover, must prove by a preponderance of the evidence that defendant did not, in good faith, propose the name of any actor to portray the leading male role in the picture, or that plaintiff, after a fair opportunity, did not refuse her approval of any such actor.

You should consider first, whether the defendant did, in good faith, propose the names of actors for the leading male role in "Carriage Entrance," and second, whether plaintiff did by her statements or conduct plainly indicate that she would not approve

any of said actors if he should be assigned to such role. Unless you should find from a preponderance of the evidence either that defendant did not, in good faith, propose the names of actors to portray such role or that plaintiff did not, after being afforded a reasonable opportunity, indicate that she would refuse to approve of any one of such actors who might be assigned to such role, defendant did not breach its contract with plaintiff by terminating her employment as and when it did, and plaintiff cannot recover in this action.

Given:

.....,
Judge.

Refused:

.....,
Judge.

GK:er 1/25/51 5 c. [109]

Instruction No. 13

Requested by Defendant, RKO Radio Pictures, Inc.

If you find that the defendant did not breach its contract with the plaintiff by terminating such contract when and as it did, and that plaintiff did breach her contract with defendant by refusing to approve an actor for the leading male role in the picture, and that the defendant is entitled to recover on its cross-complaint, then you must determine the amount in which the defendant was damaged.

The measure of defendant's damage is that sum expended by the defendant in good faith with the

expectation that the plaintiff would perform pursuant to the contract after approving an actor to portray the leading male role, and which by plaintiff's failure to approve and to perform were lost to the defendant.

[Endorsed]: Filed January 31, 1951. [110]

[Title of District Court and Cause.]

AFFIDAVIT OF VITO ROTUNNO

State of California,
County of Los Angeles—ss.

Vito Rotunno, being first duly sworn, deposes and says: I am a partner in the firm of Hartman, Rotunno and Myers, investigators and adjusters. We also are in the business of acting as an attorney service in making title reports, investigations of accidents and for service of process. On January 24, 1951, the firm of Gang, Kopp & Tyre retained us for the purpose of serving a subpoena directed to Howard Hughes, issued by the United States District Court for the Southern District of California, Central Division, in the case of Ann Sheridan v. RKO Radio Pictures, Inc., No. 10585-C. Said subpoena directed Howard Hughes to appear as a witness in the courtroom of the Honorable James M. Carter, United States District Judge, on [111] Tuesday, January 30, 1951, at 10:00 a.m.

We were unable to serve Mr. Hughes with said subpoena although we assigned several people to

the job. On January 30, 1951, my partner, Ben M. Hartman, sent to Mr. Rudin of Gang, Kopp & Tyre a statement of our actions in attempting to serve Howard Hughes. Said statement is attached hereto as Exhibit "A." I am familiar with the statements made in said Exhibit "A" and incorporate all of said statements contained therein in this affidavit as though fully set forth herein.

/s/ VITO ROTUNNO.

Subscribed and sworn to before me this 1st day of February, 1951.

EDMUND L. SMITH,
Clerk, U. S. District Court.

By /s/ WM. A. WHITE,
Deputy. [112]

To: Milton R. Rudin, Esq.,
Messrs. Gang, Kopp & Tyre,
Attorneys at Law,
1680 North Vine Street,
Hollywood 28, California.

Subject: Howard Hughes,
Beverly Hills Hotel,
Beverly Hills, California.

Re: Attempted Service of Howard Hughes. [113]

Representatives of the office of Hartman, Rotunno and Myers attempted to serve a subpoena issued by the United States District Court for the Southern District of California, Central Division, in the case

of Ann Sheridan vs., RKO Radio Pictures, Inc., Civil Action File No. 10585-C. The following is a report of events in the attempted service.

January 24, 1951

At or about 2:00 p.m., representative B. G. Potter of Hartman, Rotunno and Myers, proceeded to the Beverly Hills Hotel and went to Apartments 20 and 21 and found out that Howard Hughes is living in Apartments 19 and 19-A. Representative checked Apartments 19 and 19-A and the venetian blinds were wide open, lights were on in the apartment. Representative rang the door buzzer but no one answered. Representative remained in the area until approximately 5:30 p.m.

At 6:15 p.m., representative B. G. Potter returned to the Beverly Hills Hotel and checked Subject's apartments. Venetian blinds were drawn, lights still on. Representative could hear someone speaking on a telephone. At that time there were several other telephones in the apartment ringing continuously, so representative waited until the person got off the telephone. After waiting for approximately 15 minutes, representative rang the door buzzer but no one answered, and the person on the telephone kept on talking. Representative noticed a side window of the apartment open so called in but received no answer. Approximately twenty minutes later the phones were quiet and the man had finished talking. Representative then called out, "Mr. Hughes." and then said, "Howard." Instead of receiving a response, however, the two side windows were slammed shut. Representative then went

around to the side of the apartment and as he started up the alley a voice called out from a rear window, "Vern?" [114] Representative answered, "No, Bill." The voice then said, "Just wait a minute." Representative waited, then about thirty seconds later a man came up beside the apartment house and asked if he could help. Representative said he would like to see Mr. Hughes and the man replied that representative would have to call his office and make an appointment. Representative then got into his car and drove away. Off at 7:00 p.m.

From 8:20 p.m. to 11:00 p.m., representatives Potter and Ben M. Hartman kept the Beverly Hills Hotel under surveillance with no activity or sign of the subject.

January 25, 1951

2:00 p.m. to 7:00 p.m. Representative Ben M. Hartman kept the Samuel Goldwyn Studio under observation in attempt to serve Subject.

7:30 a.m. to 9:00 a.m. Representative Potter checked the Beverly Hills Hotel area with negative results.

3:00 p.m. to 6:00 p.m. Representative Potter returned to the Beverly Hills Hotel and kept the area under observation. Also contacted the Beverly Hills Police Department and was informed that Howard Hughes drives three vehicles which are registered to the Howard Hughes Tool Company. One is a dark blue '46 Buick and the other two are black Chevrolets. It was also learned that subject often goes up into the hills around Beverly Hills and

transacts business with various business associates in his car.

7:30 p.m. to 1:00 a.m., Representative Potter checked the San Ysidro area and the vehicles in the area but none of those in the vicinity were registered to the subject. Remained in the vicinity of the hotel until 1:00 a.m. [115]

January 26, 1951

8:00 a.m., to 9:30 a.m. Representative Potter checked the Beverly Hills Hotel and noticed a man walking down the alley to Howard Hughes' apartment. This individual then stood by the subject's apartment. Representative parked his car and walked across a field and watched for a while but nothing happened.

7:30 p.m. to 1:00 a.m. Representatives Kay Lang and Potter went to the Beverly Hills Hotel and checked the subject's apartment. The lights were on in the apartment but no one answered the door.

3:00 p.m. to 6:00 p.m. Representative Kenneth Marapese surveilled the Howard Hughes plant but subject made no appearance.

January 27, 1951

11:00 a.m. to 5:30 p.m. Representative Vito Rotunno proceeded to San Pedro and checked the yacht clubs with negative results. Various yacht clubs in Wilmington were also check with negative results.

The channel where the "Flying Boat" is located was also checked with negative results.

7:00 p.m. to 3:00 a.m. Representatives Alice Moore and Potter checked the Beverly Hills Hotel

and also went to the various eating and drinking establishments on Sunset Strip where the subject is known to frequent with negative results.

January 28, 1951

9:00 a.m. to 11:30 a.m. Representative Kenneth Marapese checked the Beverly Hills Hotel with negative results.

2:00 p.m. to 4:00 p.m. Checked the Players on Sunset Boulevard with negative results. [116]

January 29, 1951

11:30 a.m. to 12:30 p.m. Checked the Players and the Hotel in attempt to serve Subject.

In addition to the above attempts to serve the subject, this office made various telephone calls to the Beverly Hills Hotel and the Studio and the Howard Hughes Plant in attempt to locate the subject but received the stock answer that subject was out of town. A spot patrol was also kept on the Howard Hughes Plant in Culver City with negative results as no one was seen in the area answering Subject's description.

Very truly yours,

HARTMAN, ROTUNNO &
MYERS,

By /s/ BEN M. HARTMAN,
A Partner.

bmh/kf

[Endorsed]: Filed February 1, 1951. [117]

RETURN ON NON-SERVICE OF WRIT

United States of America,
Southern District of California—ss.

I hereby certify and return that I received the annexed Subp. on Jan. 9th, 1951, and returned same not served as to Howard Hughes on Jan. 30, 1951. Reason: Unable to located within Southern District of California.

JAMES J. BOYLE,
United States Marshal.

By /s/ JAMES H. BLANCO,
Deputy.

[Endorsed]: Filed February 1, 1951. [119]

In the United States District Court, Southern
District of California, Central Division

No. 10585—C Civil

ANN SHERIDAN,

Plaintiff,

vs.

RKO RADIO PICTURES, INC., a Delaware Cor-
poration,

Defendant.

VERDICT ON THE COMPLAINT

We, the Jury in the above-entitled cause, find in favor of the plaintiff, Ann Sheridan, and against the defendant, RKO Radio Pictures, Inc., a Dela-

ware corporation, on the complaint herein, and assess the damages against the defendant in the sum of Fifty Thousand Dollars (\$50,000.00), principal, together with interest in the sum of Five Thousand One Hundred and Sixty-Two Dollars and Forty-Two Cents (\$5,162.42), making a total sum of Fifty-Five Thousand One Hundred and Sixty-Two Dollars and Forty-Two Cents (\$55,162.42).

Dated: Los Angeles, Calif., Feb. 6th, 1951.

/s/ THEODORE C. HINCKLEY,
Foreman of the Jury.

[Endorsed]: Filed February 6, 1951. [141]

In the District Court of the United States, Southern
District of California, Central Division

No. 10585—C Civil

ANN SHERIDAN,

Plaintiff,

vs.

RKO RADIO PICTURES, INC., a Delaware Corporation,

Defendant.

JUDGMENT

The above-entitled action having been duly tried before the Honorable James M. Carter, United States District Judge and a jury, at a trial commencing on the 30th day of January, 1951, and continuing thereafter to the 6th day of February,

1951; the plaintiff having appeared by Gang, Kopp & Tyre, by Martin Gang and Milton A. Rudin, her attorneys; the defendant having appeared by Mitchell, Silberberg & Knupp, by Guy Knupp and Gordon Jeffers, Jr., its attorneys; both sides having been heard, and the jury having duly rendered a verdict on plaintiff's complaint in favor of the plaintiff and against the defendant in the sum of \$50,000.00 principal, together with interest in the sum of \$5,162.42, making a total sum of \$55,162.42, and the costs of the plaintiff having been duly taxed in the sum of \$968.42; [142]

The court having instructed the jury that if the jury entered a verdict on the complaint in favor of plaintiff and against defendant that the jury could not find in favor of defendant and against plaintiff on defendant's counterclaim, and the jury having rendered a verdict, as aforesaid, on the complaint in favor of plaintiff and against defendant,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that judgment be and it is hereby entered on defendant's counterclaim in favor of plaintiff and against defendant, and it is further ordered that defendant take nothing by its counterclaim;

It is Further Ordered, Adjudged and Decreed that plaintiff, Ann Sheridan, do recover of the defendant, RKO Radio Pictures, Inc., a Delaware Corporation, the sum of \$55,162.42, together with the sum of \$968.42 costs as taxed, and that the plaintiff have execution therefor.

The Clerk is directed to enter this judgment.

Dated: February 10, 1951.

/s/ JAMES M. CARTER,
U. S. District Judge.

Approved as to form pursuant to local rule 7.

MITCHELL, SILBERBERG &
KNUPP,

By /s/ GUY KNUPP,
Attorneys for Defendant.

Judgment entered February 9, 1951.

[Endorsed]: Filed February 9, 1951. [143]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendant RKO Radio Pictures, Inc., hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in said action on February 9, 1951.

Dated: March 5th, 1951.

MITCHELL, SILBERBERG &
KNUPP and

GUY KNUPP,

By /s/ GUY KNUPP,
Attorneys for Appellant RKO
Radio Pictures, Inc.

[Endorsed]: Filed March 6, 1951. [144]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS UNDER
RULE 73

Notice is hereby given that Ann Sheridan, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that part of the final judgment entered in this action on February 9, 1951, in Judgment Book No. 70, Page 717, records of the above-entitled court which allowed damages to plaintiff in the limited sum of \$50,000.00, plus interest thereon, and failed to award damages to plaintiff in a sum in excess of \$50,000.00, plus interest thereon.

Dated: March 7th, 1951.

GANG, KOPP & TYRE,

MARTIN GANG and
MILTON A. RUDIN,

By /s/ MARTIN GANG,

Attorneys for Plaintiff and
Appellant, Ann Sheridan.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 7, 1951. [145]

[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD
ON APPEAL

Defendant, RKO Radio Pictures, Inc., having filed its notice of appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in said action on February 9, 1951, and the plaintiff, Ann Sheridan, having filed her notice of appeal to said Court of Appeals from that part of said final judgment designated in her notice of appeal and having, with said notice of appeal, served and filed a statement of the points on which she expects to rely on appeal and a designation of the portions of the record to be contained in the record on appeal; and

The parties having agreed to designate, by written stipulation filed with the Clerk of the District Court the parts of the record proceedings and evidence to be included in the record on appeal in lieu of any designation by either party or any counter designation by the other party; [147]

Now, Therefore, pursuant to Rule 73(f) of the Rules of Civil Procedure, it is hereby stipulated and agreed that the record on appeal shall consist of the following:

1. Amended complaint for damages for breach of contract.
2. Motion to dismiss the second count or cause of action set forth in said amended complaint.

3. Minute order granting said motion to dismiss.
4. Answer and counterclaim.
5. Answer to counterclaim.
6. Order for pre-trial hearing on December 4, 1950.
7. Memorandum for counsel by Honorable District Judge, filed December 13, 1950.
8. Memorandum for counsel on pre-trial order by the Honorable District Judge, filed January 18, 1951.
9. Pre-trial stipulation and order of the court dated January 30, 1951.
10. The reporter's transcript of all of the evidence and proceedings at the trial, including all objections to instructions to the jury given or refused by the court and the ruling of the court on such objections.
11. All exhibits offered by either party.
12. Instructions to the jury given by the Honorable District Judge.
13. Instructions to the jury requested by the plaintiff.
14. Instructions to the jury requested by the defendant.
15. Affidavit of Vita Rotunno filed by plaintiff in connection with the motion of plaintiff for an

order of court requiring defendant to produce as a witness Howard R. Hughes, Managing Director production of defendant. [148]

16. Return of service of the United States Marshal concerning the inability of said United States Marshal to serve a subpoena on said Howard R. Hughes.

17. The verdict of the jury.

18. The judgment.

19. The notice of appeal filed by the plaintiff.

20. The notice of appeal filed by the defendant.

21. This stipulation.

It is the intention of the parties by this stipulation to include in the record upon appeal the complete record and all proceedings and evidence in the action and if, when the stenographic report of the evidence and proceedings at the trial is prepared, either party shall upon examination of said stenographic report, desire and request the inclusion in the record upon appeal of any matter not included in such stenographic report, such matter shall be included in said record on appeal.

Dated: March 13, 1951.

GANG, KOPP & TYRE and
MARTIN GANG,

By /s/ MARTIN GANG,

Attorneys for Appellant-
Appellee Ann Sheridan.

MITCHELL, SILBERBERG &
KNUPP and

GUY KNUPP,

By /s/ GUY KNUPP,

Attorneys for Appellant

RKO Radio Pictures, Inc.

It Is So Ordered. Dated: March 15, 1951.

/s/ JAMES M. CARTER,
Judge.

[Endorsed]: Filed March 15, 1951. [149]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
THE RECORD ON APPEAL AND DOCK-
ETING THE APPEAL

Good cause appearing to the Court, therefore it is hereby ordered that the time for filing the Record on Appeal and docketing the appeal may be and the same is hereby extended to and including the 15th day of May, 1951.

Dated: April 3rd, 1951.

/s/ JAMES M. CARTER,
Judge.

[Endorsed]: Filed April 3, 1951. [150]

In the United States District Court, Southern
District of California, Central Division

No. 10585-C Civil

Honorable James M. Carter, Judge Presiding.

ANN SHERIDAN,

Plaintiff,

vs.

RKO RADIO PICTURES, INC., a Delaware Cor-
poration,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, January 30, 1951

Appearances:

For the Plaintiff:

GANG, KOPP & TYRE, by
MARTIN GANG, ESQ., and
MILTON RUDIN, ESQ.,
401 Taft Building,
Los Angeles, California.

For the Defendant:

MITCHELL, SILBERBERG &
KNUPP, by
GUY KNUPP, ESQ., and
GORDON JEFFERS, ESQ.,
604 Roosevelt Building,
Los Angeles, California.

The Court: Call the calendar.

The Clerk: No. 10585-C Civil, Ann Sheridan v. RKO Radio Pictures, for jury trial.

Mr. Gang: Ready for plaintiff.

Mr. Knupp: Ready for defendant. [2*]

* * *

The Court: Mr. Clerk, call the jury.

The Clerk: As I call the names, the jurors will take their places in the jury box.

(Whereupon a jury was duly empaneled and sworn.)

The Court: We are advised that the remaining jurors will not be needed today and may be excused until further order from the clerk of this court. You are not required to remain any longer in attendance, although you may do so if you desire. You do not have to leave.

Mr. Gang, do you want to make an opening statement about [5] this case?

Mr. Gang: With your permission, your Honor.

The Court: You may. [6]

* * *

(Thereupon counsel for the respective parties made opening statements to the jury and upon the conclusion thereof the following proceedings were had.)

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

ANN SHERIDAN

the plaintiff herein, called as a witness in her own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Ann Sheridan.

Direct Examination

By Mr. Gang:

Q. Where do you live, Miss Sheridan?

A. 5263 Balboa Boulevard, Encino.

Q. And you have lived in California how long?

A. Since 1933.

Q. What was the picture in which you were rendering your services at or about the spring of 1949?

A. "I Was a Male War Bride" for Twentieth Century-Fox.

Q. Did you in 1948 have discussions with Mr. Polan Banks with reference to your services as an actress in a motion picture based on his novel, "Carriage Entrance"? A. Yes, sir, I did.

Q. Those conversations and discussions continued from 1948 into the spring of 1949 while you were in this country? A. That's right.

Q. Do you remember the date April 29, 1949?

A. Yes, that is the date I signed the contract at RKO. [28]

Mr. Gang: If the court please, may I offer the contract in evidence as Plaintiff's Exhibit 1 and ask that the handwriting on it be disregarded.

(Testimony of Ann Sheridan.)

There is some handwriting marked "Approved" in pencil. I don't know when it was put on there, but I do not offer the handwriting but merely the typewritten portion and the signatures.

Mr. Knupp: May I see it a moment, please?

(Document handed to counsel.)

Mr. Gang: Is it your Honor's custom for the attorney to hand the document to the clerk?

The Court: We don't stand on formality around here. Just conduct yourself like you ordinarily do in any court room, Mr. Gang.

Mr. Knupp: There are some other pencil marks on the document. I understand that there is nothing offered except the printed document.

Mr. Gang: If you have a copy with nothing printed on it, I will take that.

Mr. Knupp: That is perfectly satisfactory, Mr. Gang.

The Court: It will be received as Plaintiff's No. 1 in evidence.

(The document referred to was marked Plaintiff's Exhibit 1, and was received in evidence.)

The Court: Ladies and gentlemen of the jury, the parties through their attorneys have stipulated to most of [29] the documentary evidence in this case, so we will be able to eliminate a lot of evidence that is ordinarily devoted to foundation. The documents have been exhibited and we know

(Testimony of Ann Sheridan.)

which ones are going into evidence. We will save some time in that respect. However, there is not in evidence the pencil notations on the document. You may disregard them entirely.

Q. (By Mr. Gang): I have not shown it to you, Miss Sheridan, but the document in question has been stipulated to as the document which you did sign. Did you sign it on the date it bears, April 29, 1949? A. That's correct.

Q. Where were you when you signed that?

A. I believe at the home of my secretary.

Q. At the same time did you sign a letter which was brought to you with the contract?

A. Yes, sir.

Q. Also dated April 29, 1949?

A. That's correct.

Mr. Gang: We will offer that, your Honor, as Plaintiff's Exhibit 2, again disregarding a pencil line drawn on it.

The Court: It will be received as Plaintiff's Exhibit 2, disregarding the pencil notation on it.

(The document referred to was marked Plaintiff's Exhibit 2, and was received in evidence.) [30]

The Court: From time to time these will be shown to you or read to you, so you will get to see them as we progress.

Mr. Gang: With the usual facility for reading my mind, you took the words out of my mouth. I was wondering whether your Honor wanted to

(Testimony of Ann Sheridan.)

read that to the jury or whether I should, now that it is in evidence.

The Court: I am not a very good reader. You had better read it.

Mr. Gang: My effort to read it won't indicate that I think I am. With the court's permission I will read to you from Plaintiff's Exhibit 1, which is the contract which we may refer to as the contract, just the portion which has to do with these approvals, and I will read this letter which has been introduced as Plaintiff's Exhibit 2, so that you may have this part of the picture clearly in mind. From the contract I will read only paragraph 1.

“Producer”—and that word means RKO—
“hereby employs Artist”—which means Miss Sheridan—“as an actress, performer and entertainer to portray the leading female role in the photoplay now entitled ‘Carriage Entrance’ to be produced by Producer. Said photoplay may hereinafter be referred to as ‘Carriage Entrance,’ or as the ‘Picture,’ or as the ‘photoplay.’ Artist shall [31] not, however be required to render any services pursuant hereto unless and until she has approved each and all of the following:

“(a) The final shooting script of the screen play for ‘Carriage Entrance’;

“(b) The director who will direct ‘Carriage Entrance’; and

(Testimony of Ann Sheridan.)

“(c) The actor who will portray the leading male role in ‘Carriage Entrance.’

“With respect to item (a) above the Artist has heretofore approved the first draft estimating script entitled ‘Carriage Entrance’ by Leopold Atlas, consisting of a one (1) page note, one hundred forty-eight (148) pages of screen play and five (5) pages of synopsis covering the unfinished ending, all of which material is hereinafter referred to as the ‘Estimating Script,’ subject to such Estimating Script being completed and ‘polished.’ The Artist agrees that she shall not have the right to disapprove of the final shooting script if it is a reasonable completion and development of the Estimating Script or does not depart from the novel ‘Carriage Entrance’ [32] and the Estimating Script so as to substantially alter and diminish the importance of the Artist’s role as written in the novel ‘Carriage Entrance’ and in the Estimating Script.”

And the letter, which is short—

Mr. Knupp: Let me ask you, Mr. Gang. Were you reading from the contract?

Mr. Gang: Yes, paragraph 1 of the contract in its entirety.

Mr. Knupp: Is that all you expect to read from the contract?

Mr. Gang: At this time.

A letter which was signed by plaintiff at the

(Testimony of Ann Sheridan.)

same time, which is Plaintiff's Exhibit 2. It is addressed to RKO and reads:

"Gentlemen:

"Please refer to the agreement between us dated April 29, 1949, relating to my employment by you in connection with your motion picture now entitled 'Carriage Entrance,' which agreement is being entered into concurrently herewith.

"This will confirm that I have approved and hereby approve any of the following individuals to act as the director of 'Carriage Entrance': [33]

"John Cromwell,

"Robert Stevenson,

"H. C. Potter.

"You shall not be obligated to assign any of these individuals to direct the Picture, but any other individuals proposed by you to direct the Picture shall be subject to my approval, as set forth in Article 1 of said employment agreement.

"This will also confirm that I have approved and hereby approve Robert Young to portray the leading male role in 'Carriage Entrance.' You shall not be obligated to assign him to portray the leading male role in the Picture, but any other individual proposed by you to portray the leading male role in the Picture shall

(Testimony of Ann Sheridan.)

be subject to my approval, as set forth in Article 1 of said employment agreement.

“Dated April 29, 1949.

“Yours very truly,

“Ann Sheridan.”

Q. (By Mr. Gang): After signing Plaintiff's Exhibits 1 and 2, Miss Sheridan, when was the first occasion on which you thereafter went to the studios of RKO? [34]

A. My first visit to the lot after that was on June 16th, a luncheon given by Mr. Rogell, sort of a welcome luncheon to, as they say, roll out the red carpet for you and welcome you on the lot for your first picture.

Q. Can you tell us who was present at that luncheon?

A. There was Mr. Rogell, Mr. Sparks, the producer; Mr. Banks, the associate producer; Mr. Perry Lieber, head of the publicity; Mr. Hickox, my business manager, and myself.

Q. Thereafter when was the next occasion on which you came to the studio?

A. The next occasion was early in July, I would say somewhere between the 5th through the 7th. A telephone call from Mr. Banks asking me to come to the studio to discuss the script and necessary changes in it.

Q. May I at this point ask you if between April 29, 1949, and July 5, 1949, there had been any work done on the script for the picture?

(Testimony of Ann Sheridan.)

A. Yes, sir. I was informed by Mr. Banks that RKO had assigned a writer to the script, to the Atlas script, by the name of Parsonnet, and that he was rewriting the script for RKO.

Q. Before your trip to the studio early in July had you received a copy of the revised script?

A. Yes, I had received a copy of it just a couple of days before. [35]

Q. And had you read it?

A. I had read it and made notes, yes.

Q. After this call from Mr. Banks you went to the studio, you say? A. That is correct.

Q. To whose office did you go?

A. Mr. Sparks' office.

Q. Who was there on that occasion?

A. Mr. Parsonnet, Mr. Sparks, Mr. Banks, Mr. Hickox, and myself.

Q. Did you at that time have a discussion with reference to the revised script?

A. Yes, there was a discussion.

Q. Can you repeat—and may I say at this time that I don't know whether you have ever been a witness in court, perhaps you have in pictures—have you ever been a witness in court?

A. No, sir.

Q. If I may say so, nobody expects any witness to remember exactly what anybody said a year ago, so I will ask you not to try to get the exact words, but give us the substance of what was said, and if

(Testimony of Ann Sheridan.)

possible who said what. You needn't try for the exact words.

A. All right. Thank you.

Well, after Mr. Hickox and I were introduced to Mr. [36] Parsonnet, Mr. Banks asked me what I felt about the rewritten script, how I liked it. I told him that as far as my part was concerned it needed very little work to polish it and bring it up to what I expected of it, or to my liking but that I was afraid that in rewriting the part of Paul so that Melvyn Douglas would be pleased with it, that Mr. Parsonnet had minimized Mr. Young's part, the part of Martin Lucas—is that correct now?—to the extent that Mr. Young would be forced to refuse to do it. Mr. Sparks spoke up and said, "You are right, Annie, Bob has refused to do the part."

It came as a slight shock, I must admit, and there was a general discussion on his having refused the part. Mr. Sparks said that he knew that they could force Mr. Young to do the part if they were so inclined, because Mr. Young had only story approval, not script approval, but they didn't feel like doing that.

He suggested that I call Mr. Young, who was at that time on a ranch somewhere up north, and see if I could persuade him to accept the part. I told him that I didn't think I should at that particular time because I didn't think it was fair to try to persuade anyone to do a part they didn't like, or to coerce them into doing it. Perhaps we

(Testimony of Ann Sheridan.)

should wait until the part had been rewritten and built up, as Mr. Parsonnet told me that they were going to try to do, then perhaps I would have something to sell Mr. Young on. [37]

At that time Mr. Sparks asked me if I thought of any possible replacement for Mr. Young, and I said, no, I hadn't, and he handed me a casting directory and asked me to go through it for a possible replacement. I did turn through the casting directory and there were general discussions on numerous people in it, but I felt that it was much too serious a problem for the right type of person to judge too quickly, and I asked for a little more time in which to go through that directory and to see who was available before I would suggest anyone.

Mr. Knupp: Miss Sheridan, I will try not to interrupt you, but I would ask that when you are relating these conversations—you said that you felt, and I think your testimony really should be confined to what was said at the conversations. The expression of your opinions or your views, unless they were the subject of the conversation, are really not admissible.

Do you agree, Mr. Gang?

Mr. Gang: I agree with Mr. Knupp, and I should have perhaps instructed you a little more completely on the functions of a witness. You are not supposed to say what you did say, that you felt a shock. That is subjective, and unless you fell on the floor so that everybody could see it, it

(Testimony of Ann Sheridan.)

wouldn't be anything that the court would let the jury speculate on. So Mr. Knupp is entirely [38] right.

The Witness: I see.

Q. (By Mr. Gang): If you will try to relate only what was said and done. In other words, acts which are external and objective as distinguished from what you felt internally and didn't say. If you said, "I am shocked," that would be something you said; if you just felt it, you cannot say it.

Is that a fair statement, Mr. Knupp?

Mr. Knupp: That is a very fair statement, Mr. Gang. I think we are agreed on that.

The Court: Are you moving to strike, Mr. Knupp?

Mr. Gang: I will stipulate, if your Honor please, that may go out where she said, "I felt a shock."

The Court: That portion referred to by Mr. Gang may be stricken from the record, and the jury will be instructed to disregard it.

The Witness: I am sorry.

The Court: It is a very common happening, Miss Sheridan. Don't let it bother you.

Q. (By Mr. Gang): You had not finished all of that meeting yet, had you, Miss Sheridan?

A. Yes, I had. I asked for more time in which to go through the casting directory and try to select someone, the proper type for the part.

Q. For the edification of both the jury and the court, and [39] counsel, perhaps, can you describe

(Testimony of Ann Sheridan.)

what the casting directory is, how big a book it is and what is in it?

A. It is quite a big book, quite a thick book. May I use gestures with that? I would say it is about that thick (indicating).

Q. About four inches thick?

A. About three or four inches thick, and it contains pictures of all different types of actors, comedians, leading men, character men and character women, leading women, all that is in it, and it is merely a book that people can refer to to refresh their memories to see who was in the business and who might be available.

Q. When you left there did you borrow the casting directory?

A. Yes, sir, I did, as a matter of fact.

Q. You took it home with you?

A. Yes, sir.

Q. You placed this meeting sometime after the 5th of July and before the 8th of July, is that correct? A. Yes, sir.

Q. And after that how many days elapsed before you again went to RKO?

A. Well, it would have been sometime between the 8th and the 11th, as I recall it.

Q. Through whom did you get the message to come to the [40] studio on this occasion?

A. Mr. Banks, again.

Q. You again went to Mr. Sparks' office?

A. Yes, sir, he asked us to come to the studio,

(Testimony of Ann Sheridan.)

said that Mr. Sparks wished to run some film for us on possible replacements for Mr. Young.

Q. What time of day was it?

A. What time of day was it?

Q. Yes.

A. About 11:00 o'clock in the morning, I believe.

Q. Did you go to the projection room of the studio or Mr. Sparks' office?

A. We went first to Mr. Sparks' office. He said that Mr. Rogell had asked to be notified of our arrival, that he wished to come down and say a few words to us. Mr. Rogell was notified, he came to the office, said that he had been instructed to run film for us on possible replacements for Mr. Young. Mr. Rogell, Mr. Banks, Mr. Hickox and myself then proceeded to the projection room where Mr. Rogell said he would leave us in the very capable hands of Mr. Banks and Mr. Sparks, and to please notify him of my reaction to these possible replacements.

We then ran film from a picture, "Bed of Roses" it was called at that time—I don't recall, but "Born to Be Bad," I believe it was later released as—and we ran some scenes [41] on Mel Ferrer and Robert Ryan. Both of the men appeared in that picture. Mel Ferrer in the part of an artist was very little in evidence, and Mr. Ryan was one of the, shall we say, love interests of Miss Fontaine in the picture. We ran several scenes, and after the scenes were finished I said that I felt while both

(Testimony of Ann Sheridan.)

men were interesting and very fine actors, I didn't feel that either one of them was the right type for the part of Martin Lucas, or at that time Dr. Quentin, in "Carriage Entrance." Mr. Banks said that he was inclined to agree with me, Mr. Hickox agreed with me, and at that time Mr. Sparks——

Mr. Knupp: Miss Sheridan, I didn't get just the last part of that answer.

The Court: Read it, Mr. Reporter.

(The record was read by the reporter.)

Q. (By Mr. Gang): Continue.

A. (Continuing): Mr. Sparks asked Mr. Hickox and me to go to lunch with him and Mr. Banks. We accepted the invitation and started for the commissary, and en route to the commissary during general conversation Mr. Sparks volunteered the information that he felt that I was right about neither one of the gentlemen in the film being right for the part of Martin—what is the name again?

Q. Martin Lucas. [42]

A. Do you mind if I call him Dr. Quentin after this? I am more familiar with that.

Q. We will know you mean Martin Lucas.

A. (Continuing): ——of Dr. Quentin, but that he felt if either one of them would be used in the picture or could be used in the picture Mr. Ferrer would be far better as the part of Paul Boravel who played my cousin, who was my cousin in the picture. We continued to the commissary. Mr. Sparks excused himself for a few minutes and I

(Testimony of Ann Sheridan.)

believe returned to his office. He later returned, we had lunch, a very pleasant luncheon, and that was the end of that meeting.

Q. Your next trip took place how many days later, approximately, Miss Sheridan?

A. I would say anywhere from the 11th to the 14th.

Q. Of July? A. Of July, yes, sir.

Q. And from whom did you receive a call this time? A. Mr. Banks.

Q. Mr. Polan Banks? A. Yes, sir.

Q. And in whose office did the meeting take place?

A. It took place in Mr. Sparks' office.

Q. Who was present at that meeting?

A. Mr. Banks, Mr. Sparks, Mr. Hickox, and myself.

Q. Can you give us the substance of the conversation [43] which ensued?

A. We arrived at the office at the appointed time, and Mr. Sparks again asked me to go through the casting directory to see if I could think of anyone as a possible replacement. And while I was doing so Mr. Sparks said, "How about John Lund?" And I said that I was not familiar with his work. Mr. Hickox said that he had seen him in "Foreign Affair" with Marlene Dietrich, and Jean Arthur, and that he was excellent in that picture. Mr. Banks then suggested that they check Paramount as to his availability, to which I agreed and said that in

(Testimony of Ann Sheridan.)

the meantime I would try to see one of his pictures and let them know how I felt about him.

I was still going through the casting directory, and I suggested the name of Richard Conte. Mr. Sparks said that he felt that would be good casting and suggested that they contact Twentieth Century-Fox and check as to Mr. Conte's availability.

Mr. Hickox was going through a casting directory at the same time, and he said, "How about Kirk Douglas, Dana Andrews, or Glenn Ford in the part?" And Mr. Sparks said all of them would be fine casting, as far as that is concerned, but none of them were available as they were preparing pictures or working in pictures.

Mr. Hickox then said, "How about Robert Mitchum?" and [44] Mr. Sparks said that he would be fine, yes, but he was not available, he had been assigned to "Jet Pilot."

The meeting ended with all of us willing to continue to search for a possible replacement and with their agreeing to check on both Mr. Lund and Mr. Conte as to their availability.

Q. Did you have another meeting with Mr. Sparks a few days after that?

A. Yes, sir. On about between the 14th and the 16th I would say it took place.

Q. The same people present?

A. Yes, sir, the same people present.

Q. Can you give us the gist of that conversation?

A. Well, again there was the casting directory

(Testimony of Ann Sheridan.)

brought out and we were turning, leafing through it, and I asked Mr. Sparks if he had heard anything on Mr. Lund, and he said no, there had been no news from Paramount so far. I asked about Richard Conte, and he said there had been no news on Richard Conte so far.

We continued to look through the casting directory, and all of a sudden Mr. Sparks said, "How about Franchot Tone?" and I said I didn't know, I would have to think it over, maybe he would be interesting in the part.

Mr. Sparks pointed out that Mr. Tone was on the lot, working on the lot, on another picture at the time, cutting [45] another picture, and he suggested—asked me, rather, about calling Mr. Tone in for a little chat, said that he would like to see the two of us together, anyway, and I said that I would like that very much, I hadn't seen Doc Tone in years.

Mr. Sparks then called his secretary and asked her to contact Mr. Tone's office and have them get in touch with him and have him come to Mr. Sparks' office.

The Court: Did you call him Doc Tone?

The Witness: Yes.

The Court: Was that his nickname?

The Witness: That was a nickname.

The Court: All right.

The Witness: The secretary complied with Mr. Sparks' request, and he reported that Mr. Tone

(Testimony of Ann Sheridan.)

was out on the lot but they would contact him and see that he dropped by Mr. Sparks' office.

There was more general conversation and in about 15 minutes Mr. Tone came into the office. After the usual greetings and an introduction to Mr. Hickox, whom he did not know, he and I talked about our respective trips to Europe for about 20 minutes, and Mr. Tone left.

Mr. Sparks said to me, "What do you think about him?" and I said, "Why, I think he would be very interesting in the part. I think he will do." [46]

There was more general conversation in which we all joined, and finally I said, "You can tell them,"—meaning the front office—"that I definitely approve Doc Tone."

Mr. Sparks then said that it looked like our worries were over and that we could start with the picture right away, because he had already approached Mr. Tone on the subject of doing the part in the picture and Mr. Tone was anxious to do it, and that all he had to do now was to get the O.K. of the front office. And the meeting terminated on that note.

Mr. Gang: This is a good note to terminate on before lunch, your Honor.

The Court: Yes, and the right time, also.

We will take our adjournment for lunch. Ladies and gentlemen of the jury, the court admonishes you of your duty not to converse or otherwise communicate among yourselves, or with anyone else

(Testimony of Ann Sheridan.)

concerning the merits of this cause and not to form or express any opinion on the case until it is finally submitted to you for your verdict. You may be excused at this time until 2:00 o'clock. Court will remain in session.

(Whereupon the jury left the court room and the following proceedings were had in the absence of the jury:)

The Court: You may step down, Miss Sheridan.

Mr. Gang: When we come back at 2:00, your Honor, shall we then get the formality over with reference to the offer of [47] proof?

The Court: Yes, that is as good a time as any. You mean let the jury stay upstairs a while?

Mr. Gang: Yes, for a few minutes after we get back.

The Court: Yes.

(Whereupon, at 12:05 o'clock p.m. a recess was taken until 2:00 o'clock p.m. of the same day.) [48]

January 30, 1951—2:00 P.M.

(The following proceedings were had in the absence of the jury:)

The Court: Is it stipulated that the jury is absent from the court room?

Mr. Knupp: Are all the jurors absent, if the court please? I am not sure if these people back here are jurors.

Mr. Gang: I hope they are all absent.

Mr. Knupp: I wasn't sure.

Mr. Gang: I am not acquainted enough with them to know.

The Court: Are the jurors upstairs, Mr. Bailiff?

The Bailiff: Yes.

The Court: All right.

Mr. Gang: If the court please, I assume that your Honor's rulings on the law as set forth in our pre-trial hearings and in the pre-trial stipulation and order of court signed this morning still stand, and I therefore ask the indulgence of court and counsel. May it be stipulated, Mr. Knupp, that there is a witness on the stand and that I have addressed to that witness questions concerning the meaning of the phrase "minimum compensation" in the contract, and questions with reference to the damages for which plaintiff contends, that you have objected to such questions on the grounds raised in the pre-trial hearings, and on which the [49] court has ruled; that the court has sustained your objections and that plaintiff at this time is making an offer of proof so that the court may in the record be acquainted with the nature of the evidence which plaintiff would have presented if the court had not made its rulings, in other words, that all the formalities with reference to the offer of proof have been observed?

Mr. Knupp: That is stipulated. I understand that objection, generally, to be that the evidence with respect to which you expect to make an offer of proof is incompetent and immaterial.

The Court: The stipulation should probably go

further. You said, "a witness on the stand." A witness duly sworn. I take it it is not necessary to name the witness, is it, Mr. Knupp?

Mr. Knupp: I don't think so, if the court please.

The Court: For the purpose of this proceeding, I take it, is to preserve for Mr. Gang and the plaintiff his record in the event the court is wrong in the ruling that I have made. That is the purpose of this proceeding.

Mr. Gang: The only purpose, your Honor.

Mr. Knupp: I understand that if there should, unfortunately, be resort to a higher court, that the purpose of this evidence would be to lay a foundation upon which the question of the correctness of the rulings of the court [50] relative to the construction of the contract could be passed upon by the higher court, so that if evidence of this character was material or relevant and the matter was sent back for a further trial, Mr. Gang would still have an opportunity to present evidence to the effect which he now proposes to offer.

Mr. Gang: Thank you. We also have the question of damages.

The Court: You are taking up now the interpretation of the contract?

Mr. Gang: Yes, the first one is with reference to the interpretation of the contract.

The Court: And Mr. Knupp's objection is based upon the ground that the term "minimum compensation," the meaning of that term, can be ascertained from the four corners of the contract,

while it is your contention that the contract is ambiguous and that, therefore, outside evidence and without the contract would be admissible.

Mr. Gang: We also contend that it means \$150,000. But I imagine the real offer of proof is concerned with the fact that parol evidence should have been admitted for the purpose of showing what the phrase did mean.

The Court: The objection is sustained. You may proceed with your offer of proof.

Mr. Gang: Thank you. [51]

We would offer to prove that in August of 1948 the plaintiff discussed with Mr. Polan Banks the production of a motion picture by a corporation controlled by Mr. Banks, in which the plaintiff would portray the leading female role. At that time and under date of August 18, 1948, Mr. Loyd Wright, acting as the attorney for the plaintiff, addressed a letter to Mr. Polan Banks, which for the purpose hereof I term a letter of intention, which in effect set forth that in the proposed and possible contract which was to be negotiated Miss Sheridan would receive as compensation for her services the sum of \$150,000 and a percentage of the producer's net profits, \$50,000 cash payable on the first day of shooting the picture and \$100,000 deferred, the \$100,000 deferred to be paid from producer's gross receipts as a part of production costs and shall be payable *pari passu* with the other payments.

The Court: What does *pari passu* mean?

Mr. Gang: With equal step, it means in Latin.

Mr. Knupp: It means in proportion to the other deferred payments.

Mr. Gang: At this time I would like to offer this document of August 18, 1948, as part of the offer of proof which we have indicated as a letter of intention.

The Court: It may be marked as Plaintiff's Exhibit 3, for identification. [52]

(The document referred to was marked Plaintiff's Exhibit 3, for identification.)

Mr. Gang: Further, that evidence would be produced by plaintiff and Polan Banks that it was the intention of the plaintiff and Mr. Banks in negotiating for his corporation, subsequently known as Polan Banks Productions, Inc., that plaintiff would receive minimum compensation in the sum of \$150,000; that \$50,000 of said minimum compensation was to be paid in cash on the commencement of principal photography of the picture, that \$100,000 of said minimum compensation was to be deferred to be paid out of the proceeds of the picture, in exchange for which agreement on the part of plaintiff Polan Banks Productions, Inc., agreed to give plaintiff a percentage of the profits which the picture might earn.

Further, that it was not the understanding or intention of the plaintiff or of Polan Banks or Polan Banks Productions, Inc., in their negotiations to use the phrase "minimum compensation" as meaning the sum of \$50,000; that it was their understanding and intention that the phrase "minimum compensation" would be synonymous with the phrase "flat

compensation," otherwise used in the contract, and that the phrase "flat compensation" meant \$150,000; that the meaning attributed by plaintiff and by Polan Banks Productions, Inc., to the phrase "minimum compensation" in their negotiations [53] was not changed or discussed when defendant RKO entered the negotiations and prepared the contract of April 29, 1949, which is plaintiff's Exhibit 1 in this case; that there was no discussion between plaintiff and defendant with reference to the meaning of the phrase "minimum compensation" when plaintiff and defendant executed and delivered the contract of April 29, 1949; that the budget submitted by defendant to plaintiff with the letter of August 13, 1949, itself showed that plaintiff was to receive compensation in the amount of \$150,000; that Mr. Gordon E. Youngman, vice-president of defendant, and Mr. Howard Hughes, managing director-production of defendant, understood that plaintiff was to receive compensation of \$150,000, and a percentage of the profits; that the contract dated April 29, 1949, was prepared by the legal department of defendant.

We at this time offer in evidence as part of this offer of proof, and for identification, a document which has written in ink on it Defendant's Exhibit A, Samuel Rappaport, Notary Public, May 8, 1950, and in pencil "Sheridan-RKO evidence folder," which merely identifies the document which is an unexecuted agreement of blank date between Polan Banks Productions, Inc., and Ann Sheridan, and which has a letter attached which is signed by

Polan Banks Productions, Inc., by Polan Banks, dated April 12, 1949, and for clarity we would refer to this document as the first [54] draft of the contract, which will be Plaintiff's Exhibit next in order for identification.

The Court: It will be marked Plaintiff's Exhibit 4, for identification.

(The document referred to was marked Plaintiff's Exhibit 4, for identification.)

Mr. Gang: We have next a photostatic copy of an unexecuted form of contract in which the words "Polan Banks Productions, Inc., a California corporation," were stricken out by a pen strike and the words "RKO Radio Pictures" substituted, and "Delaware" substituted for "California," and various other interlineations made. This document was obtained from the legal department of defendant and it is a fact that the interlineations were made by the legal department of defendant in preparing the document which subsequently was executed by the plaintiff and defendant.

For clarity we offer this in evidence as the second draft of the contract.

The Court: It will be marked Plaintiff's No. 5, for identification.

(The document referred to was marked Plaintiff's Exhibit 5, for identification.)

Mr. Gang: Further, plaintiff will offer to prove by testimony of plaintiff and other witnesses that plaintiff and defendant were both engaged in and

members of the motion [55] picture industry, and that as such they were familiar with the customs and usages of the motion picture industry; that the evidence of the negotiations of plaintiff with Mr. Banks and with Polan Banks Productions, Inc., and the circumstances surrounding the assumption of the project by defendant, as well as the customs and usage of the motion picture industry, would show that under the circumstances of this case the phrase "minimum compensation" meant \$150,000, not \$50,000.

The Court: Does that complete the offer?

Mr. Gang: That is the completion of the offer of proof.

I assume it is deemed objected to.

The Court: Do you object to it, Mr. Knupp?

Mr. Knupp: Yes, it is objected to. That already appears from the record, if the court please. If it doesn't, it is objected to, the offer of proof, on the ground that all of the evidence offered by counsel is incompetent, irrelevant and immaterial, including not only what counsel has offered to prove by oral evidence, but also the documents which have been offered.

The Court: On the particular ground that the contract is not ambiguous, but that the meaning of the term "minimum compensation" can be spelled out from the contract between the parties itself?

Mr. Knupp: That is correct, if the court please, our contention being that the contract speaks for itself and [56] that the proper interpretation of it is

to be determined from the four corners of the instrument.

The Court: All right. The objection is sustained to the offer of proof.

Mr. Gang: With the same stipulation as preceded this offer of proof, I now make an offer of proof with reference to the issue of damages.

Plaintiff would prove by testimony of the plaintiff and other expert witnesses that the motion picture "Carriage Entrance," based upon the novel by Polan Banks, with the screen play in the form in which it had been approved by plaintiff, with plaintiff portraying the leading female role, if produced and distributed by defendant in accordance with the terms of the contract of April 29, 1949, would have grossed, taken in in receipts for the producer, an amount of money in excess of \$3,000,000; that plaintiff by reason thereof would be entitled to receive not only the sum of \$100,000 as the deferred portion of plaintiff's minimum compensation of \$150,000, but in addition thereto plaintiff would have been entitled to 10 per cent of the profits earned by said motion picture. Such testimony, as I stated before, would have been offered by plaintiff herself and by at least two experts in the motion picture industry particularly qualified to express expert opinions with reference to the earnings of a motion picture made with plaintiff portraying the leading [57] female role based on the story "Carriage Entrance" at the budget cost provided for in the contract of April 29, 1949.

Mr. Knupp: To which offer of proof the defend-

ant objects on the ground that it is incompetent and immaterial, and upon the ground that the contract itself expressly provides that the defendant is not required to use the services of the plaintiff in the picture, or to complete the production of the picture, and in the event that it does not the maximum recovery against the defendant on behalf of plaintiff is limited to the sum of \$50,000.

The Court: The court will adhere to the ruling made at pre-trial as shown in the memorandum to counsel, to the effect that paragraph 29 of the contract, and particularly the first sentence thereof, is to be interpreted so that the sentence be, quote, “. . . considered as an integral part of the whole contract,” end of quote, as indicated in the language of the Lorentz case, and that in the circumstances listed in the first sentence of paragraph 29 the obligation of the studio, if any, could be liquidated by the payment of minimum compensation, which the court has found to be the sum of \$50,000.

The objection is sustained.

Mr. Gang: That completes the formalities on that point, your Honor.

The Court: In the second offer of proof no statement [58] was made that if witnesses were duly sworn they would so testify, but I take it counsel is making no objection as to the sufficiency of the offer of proof, but only in so far as it raises the legal questions we have been considering?

Mr. Knupp: That is correct, if the court please.

The Court: Mr. Bailiff, will you call the jury down.

(Whereupon the proceedings were resumed within the presence of the jury as follows:)

The Court: Is it stipulated that the jurors are now present and in their proper places?

Mr. Gang: So stipulated.

Mr. Knupp: So stipulated.

The Court: Ladies and gentlemen of the jury, we have had other business to take care of while you have been gone.

Proceed, Mr. Gang.

Mr. Gang: Will you take the stand again, Miss Sheridan?

ANN SHERIDAN

called as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Gang:

Q. At the recess we were discussing the meeting which took place somewhere between July 14th and 16th, 1949, at [59] which time Mr. Tone came into the office. I do not know whether you completed your recollection of the substance of what took place at that meeting. My notes indicate that you were about to finish, that Mr. Tone had left and you were departing. Was anything said at the completion of that meeting?

The Court: We concluded with the testimony that the witness had said that she thought that Mr.

(Testimony of Ann Sheridan.)

Tone would do, and expressly told Mr. Sparks at that conversation, "I approve Doc Tone."

Q. (By Mr. Gang): Does that refresh your recollection? A. I believe so.

Q. Was there anything left to relate as to that conversation?

A. Yes, Mr. Sparks said that it looked like our worries were over, that our picture would be rolling right away, that all he had to do was to report to the front office, and if that was all right with Mr. Hughes then we would get started right away.

He said, upon our leaving, that he would get in touch with me with regard to wardrobe fittings, hairdressing and makeup. With that we left the studio.

Q. Is Mr. Sparks in the court room this afternoon? A. Yes, sir.

Mr. Gang: If your Honor please, would it be all right [60] if Mr. Sparks stands up so the jury can identify him as the person named?

The Court: Mr. Sparks, will you rise?

(Mr. Sparks does as requested.)

Mr. Gang: Mr. Robert Sparks.

The Court: Thank you, sir.

Q. (By Mr. Gang): What was the next meeting that took place, Miss Sheridan?

A. The next meeting was on or about the 20th of July.

Q. Where did that take place?

A. Again in Mr. Sparks' office.

(Testimony of Ann Sheridan.)

Q. What was the cast on this occasion?

A. The cast upon this occasion was Mr. Parsonnet, Mr. Stevenson, the director who had been assigned to the picture, Mr. Banks, Mr. Hickox, and myself.

I had received, prior to this meeting, a telephone call from Mr. Banks to make the appointment, incidentally, in which he had said that we had run into bad luck, that the front office had not approved Mr. Tone. And I said, "Who objects to Mr. Tone?" And he said, "Mr. Hughes." However, on the other hand, he said we were very fortunate in that Mr. Stevenson, one of the directors whom I had O.K.'d for the job, had been removed from the picture "Jet Pilot" and assigned to our picture, "Carriage Entrance."

This was the occasion for Mr. Hickox and myself to meet [61] Mr. Stevenson and to discuss the story and possible replacement for Robert Young with him. We arrived at Mr. Sparks' office at the appointed time, were introduced to Mr. Stevenson, and after the general amenities of, "So glad to have you assigned to the picture," and the usual things that are said under circumstances like that, Mr. Sparks said that it was too bad that our plans with Mr. Tone in the part of Dr. Quentin had blown up, and I asked Mr. Sparks who had objected to Mr. Tone in the part and he said Mr. Hughes. And I said, "What is his objection?" and Mr. Sparks said that Mr. Hughes wanted someone with a higher box office rating.

I said that was rather strange coming from Mr.

(Testimony of Ann Sheridan.)

Hughes, since he had submitted Mr. Ferrer who had no box office rating whatsoever, since he had only done one picture, so therefore no one knew how he would be accepted and what his rating would be.

Mr. Hickox asked Mr. Stevenson how he felt about Mr. Tone in the part, and he said he felt it would have been good casting.

I asked Mr. Sparks——

Mr. Knupp: Miss Sheridan, would you mind if I asked you to speak a little louder? I am having difficulty.

The Witness: I am terribly sorry.

I asked Mr. Sparks, then, about John Lund, and Mr. Sparks [62] said that the studio had said that he was not available.

Mr. Banks spoke up at that moment and said that he understood Mr. Lund was available but had read the script and turned it down because of such a small part.

I asked Mr. Sparks then about Mr. Conte, and he said that Twentieth Century-Fox had requested a script be sent to them for Mr. Conte's O.K., and that Mr. Hughes had declined to send the script.

Mr. Hickox then asked again about Robert Mitchum, and Mr. Sparks said that Mr. Mitchum was doing a picture called, I believe at that time, "Christmas Holiday," and would go immediately from that into "Jet Pilot," so he would not be available.

Mr. Parsonnet left the office after a general discussion of polishing the script and what-not, and Mr. Sparks asked if I would object if he asked Mel

(Testimony of Ann Sheridan.)

Berns, who had just been named the new head of the makeup office, to discuss makeup and hairdressing with me. I said, "Not at all." Mr. Berns arrived there with really no problems to discuss with him. I pointed out to him that I put on my own makeup, and Hazel, the head of the hairdressing department, said that Ruby Felker was already on the lot working, she would be finished in time and she would be assigned to my picture as my hairdresser.

That was the end of the meeting with all of us agreeing [63] to look further for another replacement.

Q. Did you have another meeting after that?

A. Yes, sir. There was another call from Mr. Banks. It was on or about the 22nd, I believe.

Q. Still in July? A. Yes, sir.

Q. Will you relate who was present on that occasion?

A. There was Mr. Sparks, Mr. Banks, Mr. Hickox, and myself.

Q. Mr. Stevenson was not present on this occasion? A. No, sir.

Q. What did you do after you got to the office of Mr. Sparks?

A. Mr. Sparks said that he had a picture he would like to run on Mel Ferrer, the picture he had done called "Lost Boundaries," and he would like to run the picture and see how I felt about Mr. Ferrer in the part of Dr. Quentin.

Q. What did you do then?

A. We went to the projection room, Mr. Banks,

(Testimony of Ann Sheridan.)

Mr. Sparks, Mr. Hickox, and myself. My secretary accompanied me that time, too. And ran the picture, "Lost Boundaries."

At the end of the picture I commented that I thought it was a very fine picture and that Mr. Ferrer was a very fine actor, but I still did not think that he was the type to play the part of Dr. [64] Quentin.

Mr. Banks said that he felt that I was right, that Mr. Ferrer was not the type. Mr. Hickox said that he didn't think that he was the type. And Mr. Sparks said that he thought we were right, that Mr. Ferrer was not the type to play the part.

With that we left the studio.

Q. The following week, which was July 25th, did you get a message to have a meeting with Mr. Sidney Rogell who was an official of the defendant?

A. Yes, sir.

Q. You did? A. Yes, sir.

Q. In response to that message did you go to Mr. Rogell's office?

A. We went first to Mr. Sparks' office with Mr. Banks present and Mr. Hickox, where Mr. Sparks said that he wanted to warn me that Mr. Rogell had been instructed to sell me on Mel Ferrer for the part of Dr. Quentin.

The Court: Does the record show who Rogell is?

Mr. Gang: Mr. Rogell is here.

The Court: I mean his official capacity with the defendant?

Mr. Gang: It hasn't as yet.

(Testimony of Ann Sheridan.)

It may be stipulated that at that time he was an executive in connection with the operation of the studio. [65]

The Court: All right.

Q. (By Mr. Gang): Proceed.

A. Mr. Banks and Mr. Sparks escorted Mr. Hickox and I to Mr. Rogell's office. After a few moments wait we were ushered in. I beg your pardon. Are we at the 25th now?

Q. Somewhere around there.

A. I am on the wrong meeting, then.

Q. Let's go back, then. What was the next meeting you had after the meeting at which time you had your discussions with reference to makeup and hair-dressing?

A. The next meeting was on or about the 25th and it was with Mr. Rogell.

Q. After the "Lost Boundaries" picture was seen?

A. Yes, I am sorry.

The Court: It was after the meeting concerning the running of "Lost Boundaries"?

The Witness: Yes.

The Court: You had the meeting concerning—

The Witness: About the 22nd.

The Court: The meeting at which Berns came down for hairdressing, and then you had the meeting where you ran the picture, "Lost Boundaries"?

The Witness: That is correct.

The Court: And then you had the meeting with Rogell?

The Witness: Yes, sir, about the 25th. [66]

(Testimony of Ann Sheridan.)

The Court: That is what you said to start with.

The Witness: Except that there was another meeting with Mr. Rogell. I got that confused. There was one later.

Mr. Gang: May we now have the one that immediately followed the one at the time where you saw "Lost Boundaries"? Who was present?

The Witness: Mr. Rogell, Mr. Hickox, and myself.

Q. (By Mr. Gang): Where was that meeting?

A. In Mr. Rogell's office.

Q. Do you remember what time of day it was, morning or afternoon?

A. It was in the afternoon.

Q. Can you give us the gist of what was said by the parties present?

A. Yes. Mr. Rogell said, after we arrived and were ushered in, that for the record this meeting would last two hours, but actually it would take about five minutes. He apologized for my having made an unnecessary trip into town, so he said, he felt it was an unnecessary trip, but that he was in a spot and he was sure I would overlook the unnecessary trip into town. He said that Mr. Hughes had instructed him to sell me on Mel Ferrer for the part of Dr. Quentin.

I said that to please Mr. Hughes I would like to be able to say that I would accept him for the part, that I thought he was right, but I just couldn't sincerely say that I felt [67] that he was the right type for the part.

(Testimony of Ann Sheridan.)

Mr. Rogell said that even if I did go against my better judgment and accepted Mel Ferrer for the part of Dr. Quentin he couldn't guarantee me that I would have him a couple of days later, because Mr. Hughes was contemplating loaning Mr. Ferrer to Mr. Goldwyn for a picture. With that he said, "That is the end of the two-hour meeting," which actually took about five minutes of our time.

I told him that I appreciated his telling us very much, that the rush call in to town, the unnecessary trip, was quite all right, because I was going to the hospital on the following Thursday and there I was assured of a rest.

That meeting closed with our remarking in a facetious manner that probably RKO had been responsible for my going to the hospital.

Q. What was the first occasion on which you went to RKO to be fitted for your wardrobe?

A. That was on July 27th.

Q. Prior to that time had you talked to the man who had been engaged to be the dress designer?

A. Yes, I had dropped by his place several times to O.K. sketches.

Q. His name was William Travilla, T-r-a-v-i-l-l-a, is that the way you pronounce it?

A. Travilla, yes. [68]

Q. And on prior occasions you had theretofore gone over the proposed sketches with Mr. Travilla?

A. Yes.

Q. And on this day, the 27th of July you were

(Testimony of Ann Sheridan.)

there for fitting the wardrobe that had been prepared pursuant to the sketches?

A. That is correct.

Q. Tell us what happened on that occasion.

A. I fitted thirteen costumes, which took most of the day to fit, and, as a matter of fact, that was most of the costumes used in the picture. I believe we had only one or two more outfits to do.

Q. Was this a period or costume picture?

A. Yes, the setting of the picture was somewhere around the 1870's.

Q. These costumes that you were to be fitted for were period dresses that had to be fitted to your particular form?

A. In a sense my particular form. There were corsets necessary for my particular figure, and a great deal of padding around the hips.

Q. Was there a milliner who fitted hats for you?

A. Yes, a milliner from Jacques there to fit hats, and there were people from Western Costuming Company to fit capes and wraps.

Q. And was anybody there with reference to hairdressing? [69]

A. Yes, sir, Hazel came up with switches and falls to match hair for the part.

Q. I don't know that this is material. I suppose the ladies know what you mean by switches and falls. I don't. Maybe the gentlemen do. I suppose it is pieces of hair that fit in your own hair?

A. Yes, matched in color, that they could use to make me look like I had long hair.

(Testimony of Ann Sheridan.)

Q. It was after this that you entered St. John's Hospital for a check-up and rest?

A. That is correct.

Q. How long were you there?

A. I was there a week.

Q. That would bring us to sometime in early August, Miss Sheridan?

A. Yes, sir, somewhere around the 11th of August.

Q. When you came back from the hospital did you have any further meetings with any of the executives of RKO?

A. Well, it was on or about the 11th that I had the next meeting.

Q. Was that again at Mr. Sparks' office?

A. Well, this is the one that I started to talk about before, it was a call to go to Mr. Sparks' office, where Mr. Sparks warned me that we were to proceed to Mr. Rogell's office and that Mr. Rogell had been instructed again to sell [70] me on Mel Ferrer for the part of Dr. Quentin. And we were escorted to Mr. Rogell's office by Mr. Banks and Mr. Sparks, and when ushered into Mr. Rogell's office Mr. Rogell said this meeting was probably a waste of time, but that he had been instructed to sell me on either Mel Ferrer or Robert Ryan for the part of Dr. Quentin. And he asked me about Mel Ferrer, and I told him I was terribly sorry, I could not see him in the part of Dr. Quentin, I did not think he was the type.

(Testimony of Ann Sheridan.)

He said, "What about Robert Ryan?" I said, "I am terribly sorry, Ryan is not the type to play the part of Dr. Quentin." With that he mentioned Robert Preston, Richard Basehart, and Van Heflin.

To Mr. Preston I said no, I was afraid Mr. Preston was not right for the part. To Richard Basehart I said he was not right for the part. I felt that he was too young and much too short in stature to play opposite me, it would be unbelievable. As to Mr. Heflin I didn't think he was correct for the part, and I also felt that he was not available.

Mr. Hickox spoke up and asked again——

Mr. Knupp: I am awfully sorry, Miss Sheridan, I do have difficulty following you.

Q. (By Mr. Gang): A little louder.

A. Very well.

Mr. Knupp: Please. [71]

A. (Continuing): Mr. Hickox spoke up and again mentioned Mr. Tone for the part, and Mr. Rogell, delving into the lower right-hand corner drawer of his desk, brought out what is known as the producer's bible, I believe they refer to it as, it is an A.R.I. book, the Audience Research Institute, a Gallup poll book which gives box office ratings on different stars in the business. He said that Mr. Hughes wanted someone with a much higher box office rating than Mr. Tone had. He opened the book, looked up Mr. Tone, and said that his rating is only 15. Mr. Hickox asked about Robert Young's rating. Mr. Rogell evidently looked up Mr. Young's rating

(Testimony of Ann Sheridan.)

and said, "Oh, it is about the same as Mr. Tone's." And with that he put the book away.

I questioned, again, the possibility of Mel Ferrer having any box office value, if that is what Mr. Hughes was looking for, and Mr. Rogell said that I was correct, that Mel Ferrer was not mentioned in the little black book at all.

Q. (By Mr. Gang): What was the conclusion of that meeting, Miss Sheridan?

A. He said that he would advise Mr. Hughes as to our decisions, my decision, and we would have to look further.

Q. After this meeting what was the next thing you did?

A. Well, on the way back to the car—— [72]

Q. Since none of the defendants are present, you will have to omit your mental processes and just tell us what you did. Again we are back to the objective facts.

A. Very well. I am terribly sorry. I asked Mr. Hickox to get Mr. Rogell to make an appointment with Mr. Hughes, so that I could talk personally with Mr. Hughes and see if we could come to any conclusion on a leading man.

Q. Was such an appointment made?

A. Yes, sir, the following Monday, which was the 15th.

Q. Of August?

A. Of August. Mr. Rogell called, called Mr. Hickox and said that he had been very fortunate in contacting Mr. Hughes and Mr. Hughes would see me that evening at 6:45.

Q. Where was Mr. Hughes' office?

(Testimony of Ann Sheridan.)

A. We went to the Samuel Goldwyn Studio.

Q. That is on Santa Monica Boulevard about two miles from the RKO studios? A. I believe so.

Q. When you got there who was there? Anybody from RKO?

A. Yes, Mr. Rogell met us at the gate and escorted us to Mr. Hughes' office.

Q. How did you get to Mr. Hughes' office?

A. We drove in.

Q. Relate what happened from then on. [73]

A. Yes. We entered Mr. Hughes' office, Mr. Hughes came out, and after the usual greetings and introduction to Mr. Hickox, whom he did not know, he offered me the leather chair in the office, and as I was being seated he said, "Where is your war paint? You don't look like you came over here for a fight." And I said, "I didn't," I merely had come over in hopes that we could come to some decision for a leading man so we could get the picture started right away.

He said, "What is wrong with Mel Ferrer or Robert Ryan?"

I said, "There is nothing wrong with either of them, they are fine actors, but none of them are the type physically for the part."

Then he said to Mr. Rogell, "Who else has been mentioned?" Mr. Rogell said, "Richard Basehart, Van Heflin, Robert Preston."

And he said, "What is wrong with those?"

And I said, "There is nothing wrong with the

(Testimony of Ann Sheridan.)

gentlemen at all, it is merely that they are not the type physically to fit the part."

I then asked him if I could have Robert Mitchum, and he said that Mr. Mitchum was not available, that he was in a picture, and the picture wouldn't be finished.

Mr. Hickox spoke up and said he had checked the schedule [74] at the studio and found that the picture, "Christmas Holiday," would be finished within a week and Mr. Mitchum would be available. And Mr. Hughes said he was not available, he would go immediately from "Christmas Holiday" into "Jet Pilot." He said that he liked Mel Ferrer for the part, and Mr. Hickox said if he was so set on having Mr. Ferrer in the picture, why not cast him in the part of Paul instead of as the romantic interest. Mr. Hughes, getting up and striding the office, said that, "We have already promised Melvin Douglas that part," speaking of the part of Paul, and he turned to Mr. Rogell and said, "Is that right, Sid?" And Mr. Rogell said, "Yes."

He said, "We have a commitment with him."

Mr. Rogell said, "Yes, we have." "Besides, he," meaning Mel Ferrer, "doesn't like that part, he wants the part of the doctor."

I then asked Mr. Hughes his objection to Franchot Tone for the lead, and he said that he wanted someone with a higher box office rating.

Mr. Hickox then said that Mr. Tone had done very well in the last picture, "Every Girl Should Be Married," with Carey Grant and Betsy Drake. And

(Testimony of Ann Sheridan.)

Mr. Hughes said that that was right, he had done well in that, but since then he had made a lousy picture in Paris called "Man on the Eiffel Tower," and besides he didn't like him for the part. [75]

With that he turned to me and asked me to reconsider, be cooperative and come to the studio the next day to look at more film on Robert Preston, Mel Ferrer, Robert Ryan, and Van Heflin. I agreed to do this.

Mr. Rogell made a note of the list of names and made an appointment with Mr. Hickox and myself for the next day between 1:00 and 1:30 to run film.

Q. The next day was Tuesday, the 16th of August? A. Yes, sir.

Q. And you went to the studio again?

A. Yes, that's right, at the appointed time.

Q. Tell us what happened.

A. We went to Mr. Rogell's office, Mr. Rogell said that he had set the film up in the projection room and had asked Mr. Banks to go with us to run the film. We went to the projection room, Mr. Banks sat with us through the film, we saw quite a bit of film on Robert Ryan, one picture or parts of one picture, in which he played a prize fighter with a cauliflower ear, another picture in which he played a bellowing, overbearing sort of mentally unbalanced millionaire. And then we saw film on Mr. Robert Preston, wherein he was a cowboy with a beard about four days old. Then we saw more film from "Bed of Roses," which was the original picture we had seen with Mr. Ryan and Mr. Ferrer, in

(Testimony of Ann Sheridan.)

which Mr. Ryan played the part of the love interest of Miss [76] Fontaine, and again Mr. Ferrer was very little in evidence as the artist in the picture. And we saw Mr. Van Heflin in a scene from a picture with Joan Crawford. The name of the picture I would not know. The titles were not given.

Upon looking at all the film we left and went back to Mr. Rogell's office where Mr. Banks left us. We went in to Mr. Rogell's office and again he said, "What about Mel Ferrer?" And I said, "No, I am terribly sorry, he is not the type for the part."

He said, "What about Robert Ryan?"

I said, "No."

He said, "What about Robert Preston?"

And I said, "No."

And he said, "What about Van Heflin?"

And I said, "No."

At this time he was jotting down notes, and he said, "What about Charles Boyer for the part?"

And I thought for a moment and I said, "I think Charles Boyer would be very fine for the part. As a matter of fact, it should be very simple to switch the character of Dr. Quentin from a Bostonian to a Frenchman with an accent, and I feel Mr. Boyer has the necessary qualities to portray the part, but would he accept such a part?"

And Mr. Rogell said that he was having Mr. Schuessler, the casting director of the studio, check as to Mr. Boyer's [77] availability, and he would be up in his office to report within a few minutes.

Mr. Schuessler arrived and Mr. Rogell asked him

(Testimony of Ann Sheridan.)

about Mr. Boyer's availability, and Mr. Schuessler said, yes, Mr. Boyer was available.

Again Mr. Rogell went over the names of Mel Ferrer, Robert Ryan, Van Heflin, and Robert Preston, and again I gave the same answers of no, I didn't think any of them were correct.

We went back, then, to discuss Charles Boyer. I said that I didn't know that he would accept the part. They said that they were improving it in the rewrite of the script, but nobody had seen it as yet. And I doubted that they would be able to make the part big enough to be attractive to Mr. Boyer.

Both Mr. Schuessler and Mr. Rogell said that the main or the prime requisite of Mr. Boyer in any picture was that he win the girl at the end of the picture, and they were sure that he would accept this part, that it would be built up so that he would be pleased with it.

We said that was fine, wonderful, and with that left the office with Mr. Schuessler saying that he would check further and let us know.

Q. Where did you go after you left Mr. Rogell's office on the afternoon of August 16th? [78]

A. We went to Mr. Youngman's office.

Q. Mr. Youngman was then a vice-president of RKO, is that right? A. I believe so.

Mr. Gang: Mr. Youngman, will you stand up?

(Mr. Youngman did as requested.)

Mr. Gang: Thank you.

Q. (By Mr. Gang): You went right into Mr.

(Testimony of Ann Sheridan.)

Youngman's office on the same floor of the building that Mr. Rogell was on?

A. Just across the hallway, yes.

Q. After you were announced were you admitted to Mr. Youngman's office immediately?

A. Yes, sir.

Q. Was there a conversation at that time?

A. Yes, there was. Mr. Hickox, after having been introduced, my having been introduced to Mr. Youngman, whom I had not met before, and being seated, Mr. Hickox started at the signing of the contract and told Mr. Youngman everything that had happened, all the people who had been O.K.'d by me, all the things that had happened, or to the best of his recollection everything that had happened, and said that Mr. Hughes seemed to be unable to make up his mind as to actually whom he wanted in the part, and would Mr. Youngman intercede on my behalf and see if he could get some conclusion [79] on the leading man, since time was running out, and it was a very vital element at that time. Mr. Youngman said that casting was not in his line, but he would see what he could do. He turned to me and said, "You did accept Charles Boyer?" And I said, "I certainly did."

With that he said that he would check to see what he could do, and we left.

Q. Did Mr. Rogell or Mr. Youngman or Mr. Schuessler communicate with you again after that date?

A. No, sir.

Q. What was the next thing that happened?

(Testimony of Ann Sheridan.)

A. I got a letter cancelling my contract.

Mr. Gang: We offer next in evidence, your Honor, the letter from defendant to plaintiff, dated August 17, 1949.

The Court: It will be received as Plaintiff's 6 in evidence.

(The document referred to was marked Plaintiff's Exhibit 6, and was received in evidence.)

Mr. Gang: I think it is stipulated that the witness received this, in the pre-trial memorandums. I won't show it to her.

The Court: So stipulated. You may read it to the jury if you desire.

Mr. Gang: This letter is on the letterhead of RKO, it is dated August 17, 1949, it is addressed to Miss Sheridan [80] and it reads as follows:

"Dear Miss Sheridan:

"Please refer to the agreement of employment between us dated April 29, 1949, relating to your employment in connection with the photoplay, "Carriage Entrance."

"We have heretofore and from time to time discussed with you and submitted to you for your approval as the actor to portray the leading male role in said photoplay the names of Robert Preston, Richard Basehart, Robert Ryan, Van Heflin and Mel Ferrer, any one of whom would have been eminently qualified to portray said leading male role. You have ad-

(Testimony of Ann Sheridan.)

vised us that you did not approve any of these five actors so submitted to you for your approval.

“The term of your employment under said agreement of employment commenced on July 6, 1949, but by reason of your failure and refusal to approve one of said actors to portray said leading male role, we have been unable to proceed with the production of said photoplay. We have incurred a large amount of costs in connection with the proposed production of the photoplay and the delay, by reason of [81] your failure and refusal to approve a leading man, has caused us to incur a large amount of expenses which would not have been so incurred had you approved one of the names heretofore submitted to you. We can no longer continue to incur these costs or delay the production of the photoplay.

“By reason of your failure to approve an actor to portray the leading male role in said photoplay, we will not utilize your services in said photoplay and we will not pay you any compensation whatsoever in connection therewith.

“Very truly yours,

“RKO RADIO PICTURES,

“INC.,

“By /s/ GORDON E. YOUNGMAN,

“Vice President.” [81-A]

Q. (By Mr. Gang): Up to and including August 16, 1949, had Mr. Rogell, Mr. Banks, Mr.

(Testimony of Ann Sheridan.)

Sparks, or Mr. Hughes, or anyone else, told you that any particular actor was assigned to portray the leading male role in the picture? A. No, sir.

Q. Up to and including August 16, 1949, had you refused to approve any man assigned to the role by defendant?

A. I beg your pardon. Would you repeat that, please?

(The question was read by the reporter.)

Mr. Gang: Is that not clear to you?

The Witness: No.

Q. (By Mr. Gang): Had the defendant told you that they had picked a man who would portray the role and you could either disapprove or approve him? A. No, sir.

Q. You received the notice of termination, which is dated August 17th, sometime on Friday, the 19th of August, is that right? A. That's correct.

Q. And that was the first notification you had of what the defendant had done, is that correct?

A. That's right.

Q. When did you first learn that the defendant proceeded to make the motion picture, "Carriage Entrance"?

A. A couple of weeks later when I read in the papers [82] that Mr. Mitchum and Miss Gardner had been assigned to the picture.

Q. And the next picture that Mr. Mitchum did for the defendant after finishing "Christmas Holiday" was not "Jet Pilot," but was "Carriage Entrance," is that correct?

(Testimony of Ann Sheridan.)

A: That's correct, yes.

Q. Prior to July 6th, 1949, on June 29, 1949, you signed a letter requested by defendant, did you not? I will show it to you. A. Yes.

Mr. Gang: By the way, your Honor, these are all part of the documents stipulated in the pre-trial.

The Court: Yes, I notice the stipulation says a letter from defendant to plaintiff.

Mr. Gang: That is correct. Didn't I say that?

The Court: You said something about her signing it.

Mr. Gang: It was sent to her, but a receipt was indicated and she signed it.

The Court: All right. It will be received as Plaintiff's No. 7, a letter of June 29, 1949, in evidence.

The Clerk: Plaintiff's Exhibit 7 in evidence.

(The document referred to was marked Plaintiff's Exhibit 7, and was received in evidence.)

Mr. Gang: This is dated June 29, 1949. [83]

"Dear Miss Sheridan:

"This will confirm our agreement in connection with the agreement of employment between us dated April 29, 1949, which agreement, as heretofore amended, is hereinafter referred to as the 'employment agreement.'

"It is hereby mutually agreed that the date not later than which we are to deliver to you a copy of the final budget for 'Carriage Entrance' and a list of all deferments payable out of the

(Testimony of Ann Sheridan.)

receipts from 'Carriage Entrance' as provided in Article 7 of said Employment Agreement shall be postponed to and including July 25, 1949."

The Court: Then down at the bottom there of it it is signed "Agreed to: Ann Sheridan."

Mr. Gang: I might state, your Honor, that the contract had certain dates and it was required that Miss Sheridan waive those dates.

The next document is dated July 8, 1949, it is addressed to the plaintiff and is agreed to by the plaintiff. We offer that as our next exhibit.

The Court: Received as Plaintiff's Exhibit 8 in evidence. You may read it. [84]

(The document referred to was marked Plaintiff's Exhibit 8, and was received in evidence.)

Mr. Gang: With your permission I will omit the first paragraph, which is the same in all, referring to the employment contract. The gist of it is in the second paragraph:

"You hereby agree that notwithstanding anything to the contrary contained in said Employment Agreement, and particularly without limiting the generality of the foregoing, notwithstanding anything to the contrary contained in Article 30 of said Employment Agreement, in the event we cast Mr. Melvin Douglas in the motion picture 'Carriage Entrance,' in connection with which you are to render your services

(Testimony of Ann Sheridan.)

pursuant to the Employment Agreement, we may, at our election, but without obligation so to do, give said Melvin Douglas co-star billing in third position of the co-stars in the same size of type as the size of type used to display your name in such co-star billing.”

The Court: That concerned Melvin Douglas’ part in a part other than that of Dr. Quentin?

Mr. Gang: That is correct, your Honor. That was the [85] second male lead.

The next document we offer is dated July 11, 1949, addressed from the defendant to the plaintiff.

The Court: Received as Plaintiff’s Exhibit 9 in evidence.

(The document referred to was marked Plaintiff’s Exhibit 9, and was received in evidence.)

Mr. Gang: On this one it does not bear Miss Sheridan’s signature, but it is stipulated that she did agree to it.

Again I will read only the second paragraph of this letter of July 11, 1949:

“Your signature in the space provided below will constitute your approval of William Travilla as the costume designer to design the wardrobe to be worn by you in connection with said motion picture ‘Carriage Entrance.’ ”

The next one will be July 25, 1949.

The Court: Letter of July 25, 1949, from defendant to the plaintiff will be received as Plaintiff’s Exhibit 10 in evidence.

(Testimony of Ann Sheridan.)

(The document referred to was marked Plaintiff's Exhibit 10, and was received in evidence.)

Mr. Gang: Again, the second paragraph of this letter of July 25, 1949, reads as follows: [86]

"It is hereby mutually agreed that the date not later than which we are to deliver to you a copy of the final budget for 'Carriage Entrance' and a list of all deferments payable out of the receipts from 'Carriage Entrance' as provided in Article 7 of said Employment Agreement shall be further postponed to and including August 15, 1949."

Signed by defendant by Gordon E. Youngman, Vice-President.

The next document will be a letter dated August 13, 1949, attached to which is a batch of pink papers dealing with the budget. We offer it as the next exhibit.

The Court: It will be received as Plaintiff's Exhibit 11 in evidence.

(The document referred to was marked Plaintiff's Exhibit 11, and was received in evidence.)

The Court: You are not going to read the budget, are you?

Mr. Gang: No, I am not. I shall not attempt to read this lengthy document, but merely call to your attention that it was sent out under date of August 13, 1949, and it was in accordance with the provisions of Article 7 which you have heard men-

(Testimony of Ann Sheridan.)

tioned before, under which plaintiff was to be apprised of the list of deferments and to get a [87] copy of the budget, and this document in question shows the items required under Article 7, and I direct the attention of counsel, the court, and jury to the last sheet which shows that the character of Barbara to be portrayed by Ann Sheridan, the amount of compensation is listed as \$150,000, and it shows the part of Paul to be portrayed by M. Douglas, and that at that time, on August 13th, the part of Quentin had an estimated cost of \$100,000, but no actor had as yet been assigned to the picture by defendant.

I shall conclude the direct examination, your Honor, with offering in evidence a copy of the resolution given to me by counsel for the defendant with reference to Mr. Howard Hughes, and I would like to offer that in evidence and be permitted to read it to the jury.

Mr. Knupp: If the court please, that letter, of course, is part of the deposition that was taken in this matter. I have no objection to stipulating with Mr. Gang as to the contents of the letter, as far as that is concerned.

Mr. Gang: That is all I want. May I read it, then?

Mr. Knupp: Just state what the effect of the letter is, and we will stipulate to it.

Mr. Gang: Thank you very much. This document—I don't want the document; I just want the fact in the record.

(Testimony of Ann Sheridan.)

The Court: You are stipulating to certain facts now, you are not going to put this letter in evidence? [88]

Mr. Gang: No.

The Court: All right.

Mr. Gang: The facts have to do with the position of Howard E. Hughes with defendant, and his authority.

Mr. Knupp has given to me from the official records of the corporation the following information, which I accept as true: Section 3A of Article IV of the By-laws of said corporation read as follows:

“Section 3A. Managing Director-Production.

The managing director-production shall be the executive officer of the corporation in charge of all motion picture production. Subject to the control and direction of the board of directors and of the president, the managing director-production shall have full authority to formulate production programs and policies, to operate the motion picture production studios of the corporation, and to have general supervision of the motion picture production business of the corporation. He shall have the power to sign, on behalf of the corporation, contracts and other instruments relating to its motion picture production business when authorized by the board of directors.

“(b) That Howard R. Hughes”—— [89]

Is it “R”?

Mr. Knupp: R.

(Testimony of Ann Sheridan.)

Mr. Gang: It is Howard R. Hughes.

“That Howard R. Hughes is the managing director-production of said corporation, having been elected to such office by the adoption of the following resolution at a meeting of the board of directors of said corporation held July 9, 1949, a quorum being present and acting throughout: Resolved that Howard R. Hughes be, and he hereby is, elected the managing director-production of this corporation, to hold office in accordance with its by-laws and applicable law.”

The Court: Those facts are stipulated, Mr. Knupp, are they?

Mr. Knupp: Yes, if the court please, that is stipulated to.

Mr. Gang: As soon as I clean up my debris here I will relinquish this spot to Mr. Knupp.

The Court: Ladies and gentlemen of the jury, a stipulation as you probably know—it won't hurt to tell you about it. Counsel used the word “stipulation.” It refers to an agreement between the two sides of the law suit that a certain fact is true, or it is an agreement to some effect, so [90] when counsel stipulate you may take those facts to which they stipulate as having been proven.

Mr. Knupp: Was the date of the passage of that resolution indicated?

Mr. Gang: It says July 9, 1949. That is the only date I remember from it.

(Testimony of Ann Sheridan.)

Mr. Knupp: That is correct.

Mr. Gang: Plaintiff has completed its direct examination of the witness.

The Court: You may cross-examine, Mr. Knupp.

Mr. Knupp: Do you take a recess in the middle of the afternoon?

The Court: We can take one now or we generally take one about 3:15 or 3:30. Would you prefer one now?

Mr. Knupp: If it suits your Honor's convenience.

The Court: Your convenience is as important as mine, Mr. Knupp.

The jury will be excused for a short recess. Ladies and gentlemen of the jury, the court admonishes you of your duty not to converse or otherwise communicate among yourselves or with anyone upon any subject touching the merits of the cause on trial. You are not to form or express any opinion on the case until it is finally submitted to you for your verdict. The jury may retire.

(Whereupon the jury retired from the court room.) [91]

The Court: Court will recess.

(A recess was taken.)

The Court: Is it stipulated that the jurors are present and in their proper places?

Mr. Knupp: So stipulated.

Mr. Gang: So stipulated.

(Testimony of Ann Sheridan.)

The Court: Proceed, Mr. Knupp.

Cross-Examination

By Mr. Knupp:

Q. Miss Sheridan, you mentioned a man named Hickox in your testimony. A. Yes, sir.

Q. Who was or is Mr. Hickox?

A. He is my business manager.

Q. How long has he been your business manager?

A. He has been with me about fourteen years.

Q. Was he with you on all of the occasions to which you have testified when you visited the studio?

A. Yes, sir.

Q. And Mr. Hickox generally made these arrangements for your visits to the studio, is that correct? A. Sometimes he did, yes.

Q. But on all of the occasions to which you have testified and at all of the conversations to which you have testified, Mr. Hickox was present? [92]

A. Yes, sir, he was there.

Q. I think you said that the first mention that was made of the name of Mel Ferrer or Robert Ryan was at a meeting which you had sometime between July 8th and July 11th?

A. I believe so, yes, the second trip to the studio.

Q. And prior to that time had it been determined that Robert Young would not portray this role?

A. Yes, sir, at the first meeting.

(Testimony of Ann Sheridan.)

Q. And the first meeting you said occurred about July 5th?

A. Between the 5th through the 7th, somewhere in there, yes.

Q. In that connection, Miss Sheridan, the fact is that Robert Young didn't refuse to play this role until July 11th, so far as any written refusal is concerned. I call your attention to that fact because I don't want you to be confused as to the date.

A. To my recollection it was before the 11th that we had the meeting. I believe that Mr. Rogell said in his deposition that he received a telephone call from Mr. Nat Goldstone saying that Mr. Young would not do the part. That could have been before the 11th.

Q. It was before the 11th that you got the information? A. I believe so, yes.

Q. Had you talked to Mr. Rogell before that time about [93] the matter? A. No, sir.

Q. I beg your pardon? A. No, sir.

Q. When Mel Ferrer was mentioned to you as a possibility for the leading role in this play, did you know Mr. Ferrer personally? A. No, sir.

Q. Had you ever seen any picture in which he had appeared?

A. No, not when he was first mentioned.

Q. You, as a matter of fact, had been abroad for some time?

A. I had been abroad for seven months.

Q. Eleven months? A. Seven months.

(Testimony of Ann Sheridan.)

Q. Had you learned anything before that time about Mr. Ferrer's work as a motion picture actor?

A. Before that time, no, sir. He hadn't made any pictures before that that had been released.

Q. Did you know before August 8th or 11th, whenever this meeting occurred, did you know Robert Ryan personally? A. No, sir.

Q. Had you ever seen him in any motion picture prior to that date? [94]

A. Prior to the 11th?

Q. Prior to the 11th of August.

A. Only what had been run at the studio.

Q. You hadn't seen anything at the studio prior to August 11th?

A. Yes, "Bed of Roses," in which Mr. Ryan and Mr. Ferrer both played.

Q. I understood your testimony to say that that was run for you on August 11th.

A. It was, it was run again, part of the film was run at the second meeting when Mr.—

Q. When was the first meeting when you saw any film at the studio?

A. It was the second meeting there which had been between the 8th and 11th of July, somewhere along in there.

Q. Fixing that as the date, had you ever seen any picture in which Mr. Ryan had appeared?

A. Yes, sir.

Q. Did you see any pictures in which he appeared other than those that were shown to you at the studio after that meeting?

(Testimony of Ann Sheridan.)

A. After that meeting?

Q. Yes. A. No, sir.

Q. And prior to August 17th? [95]

A. No, sir.

Q. So that all of your knowledge with respect to Mr. Ryan's ability or capability as a motion picture actor was determined from what you saw in the film at the studio? A. That's right.

Q. Either on this occasion or on the subsequent occasion when it was re-run, is that correct?

A. That's correct.

Q. I think you said there was some conversation after you saw this film, some conversation with Mr. Banks and Mr. Hickox and Mr. Sparks, about what they thought about the availability of Mr. Ferrer or Mr. Ryan, I shouldn't say "availability"—I mean whether or not either of those gentlemen were proper casting in this part. A. Yes, sir.

Q. And I think you said then at the time that you didn't think either of them were proper casting for the part? A. That is correct.

Q. Did you then express any opinion as to why you didn't think they would be properly cast in that part?

A. I don't know that I pointed out exactly all the things that were discussed later. I did say that I didn't think they were the physical type, I didn't think they would be believable in the type of the doctor.

Q. Did you say that on the first occasion when you saw [96] this film? A. I believe so, yes.

(Testimony of Ann Sheridan.)

Q. Did you say that with respect to both of these men? A. Yes, sir.

Q. Tell me what Mr. Banks said with respect to that matter? He was present.

A. He said he was inclined to agree with me.

Q. And Mr. Hickox, your manager?

A. Yes, he said he felt I was right.

Mr. Gang: Excuse me. Just a moment. I think Mr. Knupp misspoke when he said "manager." Miss Sheridan said "business manager."

Mr. Knupp: To be perfectly frank with you, Mr. Gang, I didn't know there was any difference between a manager and business manager.

Mr. Gang: If there is, I would like to maintain that difference.

Mr. Knupp: If there is any difference. I intended to say "business manager."

Q. (By Mr. Knupp): You say Mr. Sparks was in agreement with these other gentlemen?

A. Yes.

Q. Mr. Sparks, I assume had been at the studio some time, for some years prior to this time, Miss Sheridan, had he not, to your knowledge? You knew Mr. Sparks, didn't you? [97]

A. Yes, I have known Mr. Sparks for many years.

Q. Did Mr. Sparks say anything to you before you went in to see the picture about his belief with respect to whether or not Mr. Ryan or Mr. Ferrer would be proper casting in this part?

(Testimony of Ann Sheridan.)

A. No. He merely said that they were running some of the film to see what I thought of them.

Q. And he asked you to go in to look at this film in order that you could determine whether or not, if either one were proposed for this role, you would be agreeable?

A. I beg your pardon. I didn't quite get that.

Q. He asked you to go in and look at the film in order to determine if you would approve either of these men if they were assigned to this role?

A. Yes, sir.

Q. And he didn't, before he took you in to see the film, suggest to you that he didn't think that either of them were proper casting for the part?

A. No.

Q. Did you ever talk to Mr. Stevenson, the director, about the question of whether Mr. Ferrer or Mr. Ryan were proper casting for this part?

A. Not to my recollection, no.

Q. Mr. Stevenson was present at one meeting, I think you said? [98]

A. That's correct.

Q. And at that meeting was the question of who was to be assigned to this leading male role discussed at all?

A. To some extent, yes.

Q. And was Mr. Ryan's name mentioned at that time?

A. Not that I recall.

Q. Was Mr. Ferrer's name mentioned?

A. Not that I recall.

Q. So that as far as you now recall Mr. Stevenson never expressed any opinion in your presence respecting the matter of whether Ferrer or Ryan

(Testimony of Ann Sheridan.)

or any of these other people were proper casting for this part?

A. No, sir; he just had been assigned to the picture.

Q. You said, I think, that Mr. Sparks mentioned the possibility that Mr. Tone might be assigned to this part. Do you recall just what Mr. Sparks said in that respect? A. Yes.

Q. Will you tell us what that was?

A. Yes. I was looking through the casting directory at Mr. Spark's request, he said, "How about Franchot 'Tone?'" I said I didn't know, I would think about it. He might be interesting in the part. He said that Mr. Tone was on the lot and would I object if he called Mr. Tone in so that he could see the two of us together. I said certainly not, that I hadn't seen Mr. Tone in ages and I would be very happy [99] to see him. He called Mr. Tone in.

Q. I think you said then, after talking to Mr. Tone, that you would be satisfied with him in the part?

A. Yes, sir, I said he was acceptable.

Q. And did Mr. Sparks then tell you that the question of whether Mr. Tone would be assigned to the part would depend upon what the head of the production department said about it, something to that effect?

A. Yes, he said he would have to take it up with the front office, yes.

Q. How long thereafter was it before you

(Testimony of Ann Sheridan.)

learned that the studio was not satisfied to assign Mr. Tone to the part?

A. Within the next two or three days.

Q. And who told you that?

A. First Mr. Banks by telephone.

Q. And then later Mr. Sparks confirmed it?

A. That's correct.

Q. I think you said that on August 16th you had this meeting in Mr. Rogell's office? A. Yes.

Q. And at that time, as I understand you, Mr. Rogell said to you, "What is wrong with Ryan?"

A. No; he asked me how I felt about Mr. Ferrer in the part, or Mr. Ryan in the part, and I repeated what I had told him many times. [100]

Q. Many times? A. Well, several times.

Q. When had you discussed this matter with Mr. Rogell prior to that time?

A. I had discussed Mel Ferrer with him prior to that on one previous occasion.

Q. When was that?

A. After the picture, "Lost Boundaries," was run, that would be about the 25th of July, I believe.

Q. And had you discussed with him the assignment of Mr. Ryan to the part before?

A. No, sir.

Q. So that this was the first time that you had intimated or told Mr. Rogell that you would not approve Ryan in the part?

A. Well, I had told Mr. Sparks previously, and I know that was passed on to Mr. Rogell. It is the first time I personally told him, yes.

(Testimony of Ann Sheridan.)

Q. Miss Sheridan, I would like to have you answer the question with respect to your conversation with Mr. Rogell. This was the first time, was it not, that you intimated or told Mr. Rogell that you would not approve Ryan in the part?

A. Yes, sir.

Q. What did you say to Mr. Rogell was the reason why you would not approve Ryan? [101]

A. I didn't think he was the type for the part.

Q. Did you tell Mr. Rogell that you had seen him in nothing except this one film at that time, "Bed of Roses"? A. I don't know that I did.

Q. At any rate, whatever conclusion you reached with respect to Mr. Ryan or, so far as that is concerned, on Mr. Ferrer, was reached by reason of what you saw in this one film, "Bed of Roses," is that correct?

A. "Bed of Roses" and "Lost Boundaries," with Mr. Ferrer.

Q. Did Mr. Rogell tell you that the studio was willing to assign and would assign either Ryan or Ferrer to the part if you would approve?

A. I don't recall that he did. He merely asked me if I would approve him.

Q. And he didn't intimate to you that the studio would be glad to assign either one of those to the part if you would approve him?

A. On this particular occasion? Which one are you talking about?

Q. This occasion or any other occasion, Miss Sheridan.

(Testimony of Ann Sheridan.)

A. He merely said that Mr. Hughes was set on having Mr. Ferrer play the part, that's all.

Q. There wasn't any question in your mind, was there, from what was said to you, that if you would approve either one of these two gentlemen the studio would assign the one [102] that you approved to this part?

A. Yes, there might have been some question in my mind.

Q. You mean you didn't understand that if you approved either one of these two men the studio would assign that man to this part?

A. No, because of something Mr. Rogell himself had said earlier.

Q. Did you ask Mr. Rogell or anybody else at the studio whether or not if you approved they would assign the person that you approved to the part? A. No, sir.

Q. I think you said that Mr. Rogell also proposed at this meeting on August 15th the name of Mr. Robert Preston for the part?

A. That is right.

Q. Did you know Mr. Preston personally?

A. No, sir.

Q. Had you ever seen him in a motion picture?

A. I had seen him in motion pictures, yes.

Q. What pictures had you seen him in?

A. I wouldn't know the titles.

Q. Do you remember the title of any picture you ever saw Robert Preston in?

A. No, I don't recall that I do.

(Testimony of Ann Sheridan.)

Q. Do you know how long it had been prior to this date [103] that you had seen Robert Preston in a motion picture? A. No, sir.

Q. When Mr. Rogell suggested the name of Robert Preston to you did he state to you that if Preston was satisfactory the studio would assign him to the role? A. No, sir.

Q. Did you know Richard Basehart on August 15, 1949? A. No, sir.

Q. Had you ever seen Mr. Basehart in a motion picture? A. Yes, I had seen him in one.

Q. What picture did you see him in?

A. I don't know the name of it.

Q. How long had it been before this that you saw him in a picture?

A. That I couldn't say, either.

Q. Did you see Mr. Basehart or Mr. Preston in any pictures subsequent to August 15 and before August 17th in an effort to determine whether or not they might be proper casting?

A. Subsequent to the 15th and before the 17th?

Q. Between the 15th and the 17th when the contract was terminated?

A. I saw Mr. Preston, yes.

Q. Did you see Mr. Basehart?

A. No, sir. [104]

Q. Did you on August 15th recall the picture in which you had seen Mr. Basehart?

A. No, sir.

Q. Do you recall, or did you then, or do you now

(Testimony of Ann Sheridan.)

recall what sort of a part Mr. Basehart played in that picture?

A. He played the gangster, a psychological killer.

Q. And you don't remember the name of the picture? A. No, sir.

Q. Do you remember who played with Mr. Basehart in the picture? A. No, sir.

Q. Had you seen Mr. Basehart prior to that time in more than one picture, Miss Sheridan?

A. I don't believe so, no.

Q. You had, of course, seen Van Heflin in pictures? A. Yes, sir.

Q. When Mr. Rogell suggested Mr. Van Heflin's name as a possible actor for this part, what did you say to Mr. Rogell about Van Heflin?

A. I said that I didn't think that he was the type to play the part of the doctor. I also didn't think he would be available.

Q. So on August 15th, so far as any of these men who were mentioned to you then, that is to say, Ryan, Ferrer, Basehart, and Van Heflin, you said distinctly that you would [105] not approve any of them?

A. That I did not approve them, that's correct.

Q. Now, you said, I think, the next day or August 15th, that evening, you talked to Mr. Hughes and Mr. Rogell at Mr. Hughes' office at the Goldwyn Studios? A. Yes, sir.

Q. And Mr. Hughes asked you if you wouldn't then, the next day, look at some film of some of these men in order to see if you couldn't be con-

(Testimony of Ann Sheridan.)

vinced that one of them might be available for this part, is that correct? A. Yes, I believe so.

Q. And on August 16th you returned to the studio and you saw some film? A. Yes, sir.

Q. Tell me, Miss Sheridan, what film you saw on August 16th at the studio?

A. There were no titles given. I saw film on Mr. Ryan.

Q. How much film on Ryan did you see?

A. That I wouldn't know, how much.

Q. Was it a picture of Ryan that you had seen before? A. No.

Q. Was this a new picture?

A. There were excerpts from two pictures run with Mr. Ryan, three actually. One was "Bed of Roses," they ran more of that, and the other two were pictures that I had not seen. [106]

Q. And do you remember what roles Mr. Ryan played in those pictures?

A. Yes, sir; in one he played a punch-drunk prize fighter with a cauliflower ear, and in the other one he was an overbearing, bellowing sort of mentally unbalanced person.

Q. Those were the two other than "Bed of Roses," and in "Bed of Roses" what part did he play?

A. He played one of the romantic interests of Miss Fontaine in the picture.

Q. That is Joan Fontaine?

A. That is correct.

Q. I think Miss Fontaine is generally recognized—I probably shouldn't ask this of you, but I

(Testimony of Ann Sheridan.)

think you probably are a capable witness on the point—she is recognized as one of the leading stars in the motion picture world?

A. That's correct.

Q. And you said you saw some film of Ferrer?

A. Yes; more of "Bed of Roses."

Q. What part did Ferrer play in that?

A. He played an artist. He was very little in evidence.

Q. And you had seen previous to that time a film entitled "Lost Boundaries," in which Ferrer appeared.

A. That's correct.

Q. What part did he play in that picture?

A. He played the part of a Negro physician that was [107] passing as white.

Q. I think you also said that you saw some film in which Robert Preston appeared?

A. That's correct.

Q. Do you recall the title of that film.

A. No titles were given.

Q. What part did Mr. Preston play?

A. A cowboy.

Q. Do you recall anybody else that appeared with him in the film?

A. Yes; Mr. Mitchum was in it.

Q. Mr. Mitchum and Mr. Preston were in the film?

A. That's right.

Q. Do you remember was there a feminine lead?

A. There was, but she wasn't much in evidence. I don't know who it was.

Q. You don't know who it was?

(Testimony of Ann Sheridan.)

A. No, sir.

Q. You cannot now give us the title of the film which you saw on August 16th at RKO in which Robert Preston appeared? A. No, sir.

Q. And I think you said that so far as Preston was concerned this film that you saw on August 16th at RKO was the only—I don't know what you said—did you say that was the only film you saw of Preston? [108]

A. No; I said I had seen him previous to that.

Q. You saw no film in which Basehart appeared?

A. No, sir.

Q. Miss Sheridan, you went into one of the theatres at the studio in order to see these films?

A. Yes, sir.

Q. You went, as I understand it, from Mr. Rogell's office?

A. Yes, on the 16th, that's correct.

Q. And you were accompanied by Mr. Hickox and Mr. Banks? A. That is correct.

Q. And Mr. Sparks?

A. Not Mr. Sparks. Just Mr. Banks.

Q. Just Mr. Banks and Mr. Hickox and yourself? A. Yes.

Q. All three of you were together, I suppose, on the occasion when you viewed these films?

A. Yes, sir.

Q. And when you came out and left the theatre and went to the office of Mr. Rogell did all three of you go together? A. Yes, sir.

Q. Was there any conversation, Miss Sheridan,

(Testimony of Ann Sheridan.)

during the time that you were either viewing these pictures at [109] RKO or after you had viewed the pictures and before you got to Mr. Rogell's office, with respect to the selection of the character for the leading male role?

A. Not that I recall, no, sir.

Q. Was there any conversation between Mr. Banks and Mr. Hickox that you overheard respecting the matter? A. No; Just general chatter.

Q. Specifically, Miss Sheridan, I ask you whether or not on that occasion you heard Mr. Hickox, your business manager, ask Mr. Banks whether or not he didn't think that there might be some difficulty about this picture starting, and whether or not he thought RKO would be willing to pay you the sum of \$50,000 and release you from your commitment?

A. No, sir, I heard no such conversation.

Q. You heard no such conversation?

A. No, sir.

Q. And Mr. Hickox never related any such conversation with Mr. Banks to you at any time thereafter? A. No, sir.

Q. Did you at any time, Miss Sheridan, say to anybody, either in the meeting with Mr. Hughes on August 15th or in any of these various meetings to which you have referred, that you wanted to know whether or not if you approved these proposed actors for this role RKO would assign the one that you approved to the role? [110]

A. I am terribly sorry. Would you repeat that?

(Testimony of Ann Sheridan.)

The Court: Read it, Mr. Reporter.

(The question was read by the reporter.)

The Witness: No, sir.

Mr. Knupp: That is all, if the court please.

Mr. Gang: No redirect, your Honor.

The Court: You may step down, Miss Sheridan.

The Witness: Thank you.

Mr. Gang: Call Mr. Perry Lieber and his files.

PERRY LIEBER

called as a witness under Rule 43 (b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

Mr. Gang: How late does your Honor run in the afternoon?

The Court: We generally go to 4:30. Is that all right?

Mr. Gang: Yes.

The Court: Is that all right with you, Mr. Knupp?

Mr. Knupp: Yes, if the court please.

The Clerk: State your name, please.

The Witness: Perry Lieber.

The Court: Is this witness called under 43 (b) of the Civil Rules?

Mr. Gang: Yes, your Honor. He is an official of the defendant. [111]

The Court: The rules provide that a party or an employee or official of a party may be called as an adverse witness under the Rules of Civil Procedure,

(Testimony of Perry Lieber.)

and questioned as if he were on cross-examination, which means that the plaintiff may call an official of RKO and question him as if he were on cross-examination and not be bound by his testimony, but ascertain such facts as are material from the cross-examination.

Mr. Gang: I trust that I might tell the jury that I don't consider Perry Lieber adverse in any sense.

Direct Examination

By Mr. Gang:

Q. Will you state your position with the defendant?

A. Publicity director at the RKO Studios.

Q. How long have you occupied that position?

A. About the last 11 years.

Q. How many people are employed under you in that department?

A. At the time of "Carriage Entrance" there were seventeen. Since that time the department has been increased somewhat.

Q. Increased? A. Yes.

Q. Can you state briefly to the court and jury enough about the operations of your department so the rest of your testimony will be somewhat more intelligible? [112]

A. It is the duty of my department to publicize and exploit the motion pictures made by RKO Radio Pictures, and their personalities.

Q. In doing so you are kept informed as to what is going on in the studio, generally speaking?

(Testimony of Perry Lieber.)

A. Yes, sir.

Q. And from whom do you get your instructions as to what pictures are to be exploited?

A. From the production head of the studio.

Q. And at the time in question in this litigation it was Sid Rogell, was it not?

A. That is correct.

Q. Did you during this period of time, and I restrict my questions to the time involved in this litigation, which is roughly from April of 1949 until October of '49, did you get any instructions from Mr. Howard Hughes?

A. No, sir, I did not.

Q. In other words, Sid Rogell was your contact with the front office?

A. That is correct.

Q. And in your work you maintain a file in which you keep information with reference to the activities on a particular project?

A. I do.

Q. And you have such a file entitled "Carriage Entrance"? [113]

A. I do.

Q. And you have heretofore examined that file and have found no written instructions from either Mr. Hughes or Mr. Rogell to you with reference to that picture?

A. That is correct, yes, sir.

Q. In other words, whatever instructions you got were oral?

A. Correct.

Q. From time to time you did have occasion to speak with Mr. Hughes about the activities of your department, did you not?

A. Yes, sir.

Q. And where did you meet with him when you did meet?

(Testimony of Perry Lieber.)

A. I would meet in one of three places; either at his office at the Goldwyn Studios, at the Players Restaurant, upstairs of the Players Restaurant, or at the Beverly Hills Hotel.

Q. And during the entire time in question you never spoke to Mr. Hughes on the RKO lot?

A. No, sir, I did not. That is, not in person. I have many times on the phone.

Q. On the phone? A. Yes.

Q. Would you call him or would he call you?

A. Both. [114]

Q. You brought your file with you, Mr. Lieber. Will you direct your attention to it and find the item dated August 11, 1949?

A. Is this in the——

Q. For the purpose of locating it, refer to your deposition, which we are not using as yet, but you can use it to identify the document. Look on page 10, line 19. That relates to the idea which you were discussing with one of your assistants, Mr. Margulies.

The Court: The particular question concerns an item of August 11, 1949.

The Witness: This is going to be awfully tough, Martin, to identify. I haven't got them in chronological order here.

Q. (By Mr. Gang): May I call your attention to the fact that this was a memorandum of a discussion between your unit man, as you called him, and yourself, about converting the Carey mansion from "Bed of Roses" into an old New Orleans

(Testimony of Perry Lieber.)

home for "Carriage Entrance." Would that help you locate that, dated August 11, 1949? You and I went over it at the time of the deposition and it was the first item we came across. Is it there?

Mr. Knupp: Perhaps Mr. Gang could find the particular item he refers to in the file.

Mr. Gang: You do me great honor. I don't know Mr. Lieber's files. [115]

Mr. Knupp: You have been over them.

Mr. Gang: It really isn't that important.

The Witness: I am just wondering whether it isn't in this other file in printed form.

Mr. Gang: I can't say. Let's pass on from that. Do you remember the discussion with Mr. Margulies about having a costume party on that set?

The Witness: Yes, I do.

Q. (By Mr. Gang): Was there also discussion at or about that date, August 11th, with reference to getting what you called a color layout of Ann Sheridan in her fancy wardrobe?

A. There was, yes, sir.

Q. The point I make is as of August 11, 1949, you and your department were proceeding with plans for publicizing "Carriage Entrance," were you not? A. That is correct.

Q. The next item we find is August 15, 1949, on page 12, Mr. Lieber, also dealing with possible picture layouts on "Carriage Entrance" which might be of interest to magazines, national or fan magazines.

A. I might add the reason those clippings aren't

(Testimony of Perry Lieber.)

here, Martin, is those were memos that we discussed at that time.

Q. What has happened to them?

A. I will have to look and see if we can find them. They are not in this file. [116]

Q. Do you remember the discussions?

A. I do.

Q. The purpose of them, of course, is to refresh your recollection as to what took place back in August. Do you remember the discussion with Mr. Milt Howe of your department of this so-called magazine layout for Ann Sheridan in "Carriage Entrance"? A. I do.

Q. That was about the 15th of August?

A. Right along in there.

Q. I call your attention to the memorandum dated August 15, 1949, which is on page 12, lines 12 to 20, dealing with a suggested layout of a long love scene between Ann Sheridan and the leading man, not Douglas and not yet cast. Do you remember the discussion you had about that? A. I do, sir.

Q. Can you relate what that discussion was?

A. We thought it would be a very good magazine layout that would be easily placed in a national or fan magazine, to photograph the love scene from "Carriage Entrance" with Miss Sheridan and the leading man.

Q. And as of that date your department—I refer now to August 15, 1949—you or your department had not yet been informed by anybody as to who the leading man might be?

(Testimony of Perry Lieber.)

A. That is correct. [117]

Q. On the other side of the file we were talking about you had what you call handouts. Can you tell the jury and the court what handouts are?

A. There are several forms of handouts that we supply to the press. There is what we call our spot news, such as castings, new stories purchased, leading men assigned; there are what we call feature stories that we service to the feature sections of the newspapers; there are fashion items; in other words, we try to cover every media we possibly can with material that will publicize our pictures and stars.

Q. And the information that you give out you personally check to see that it is as accurate as possible?

A. Most of it, yes. I don't read all the copy, but most of it I do.

Q. Directing your attention to the first dated item under "Handout" September 16, 1948, do you recall that handout had to do with the type of the so-called independent motion picture deals that were being set up by Mr. Howard Hughes for RKO?

A. I don't recall it offhand.

Q. Will you look at it?

The Court: This is 1948?

Mr. Gang: Yes. I shall lead up to the point.

The Witness: On what page is that?

Mr. Gang: It appears on page 13, line 12, of the deposition, [118] if that helps you find it in your file. According to the deposition it was on the right

(Testimony of Perry Lieber.)

side, on the inside of your file, it was the first dated document under "Handouts."

The Witness: The date was what, Martin?

Mr. Gang: September 16, 1948. Look for the one which mentions "Completion of negotiations of Mr. Hughes with Polan Banks for feature or features starring Ann Sheridan." That is the first item in the file on that subject according to my record. Are you able to find it?

The Witness: No, sir.

Q. (By Mr. Gang): Are you sure you have the same file?

A. I don't think we have the whole file here, Martin.

Q. From looking at your deposition, if you will, I would like you to refresh your recollection as to that particular item so we can get the facts before the jury. I want you to speak from your recollection as refreshed.

A. I recollect it now, yes.

Q. You do remember giving out that handout at about that time?

A. I am not sure of the date, but I do remember the copy.

Q. And you wouldn't say that that date, which was obtained from your file, was not approximately correct, September of '48?

A. No, it should be correct. [119]

Q. About that time you did give out for the studio an official handout about Polan Banks making a picture with Ann Sheridan, which would be an

(Testimony of Perry Lieber.)

independent deal released by RKO; is that correct?

A. As I remember it, that was a part of an over-all story.

Q. Will you look next for the item dated August 2, 1949. In the deposition, to help you find it, it is page 14, line 5, and that has to do with Mr. Margulies, again, and has to do with trades. I assume that meant trade papers like "Variety," is that correct?

A. That is correct.

Q. That is the release dated August 2, 1949, dealing with William Travilla having been assigned by RKO to design Ann Sheridan's wardrobe.

A. What my girl has done is she has left the spot releases out of my file completely. That is what happened, Martin.

Q. We will try to do the best we can without them. I am sure it was unintentional. We will go ahead and do the best we can. If it becomes important we can get them in tomorrow morning. Perhaps it won't be. Particularly if the deposition that you gave refreshes your recollection so that you can testify from your recollection.

A. All right. [120]

Q. Do you remember about August 2nd, 1949, there was a release given out by your office to that effect, to wit, that Mr. Travilla had been assigned by the defendant RKO to design Ann Sheridan's costumes or wardrobe, is that right?

A. Yes, sir.

Q. The next item that I want to question you about has to do with an item given out by your office

(Testimony of Perry Lieber.)

that the picture, "Carriage Entrance," would face the camera about August 15, 1949. You might look at page 14, line 25, for that reference.

A. I remember that, yes.

Q. You do remember giving that out?

A. Yes.

Q. From whom did you get that information, if you remember, Mr. Lieber, when the picture would face the camera?

A. I believe it was from Mr. Sid Rogell.

The Court: When was it given out?

Q. (By Mr. Gang): Can you answer that question, Mr. Lieber?

A. I am just looking to see if the date was here that we released the story. It would appear on the 15th, which would mean it was given out the 14th to appear the following day.

The Court: Of August, given out the 14th to appear the 15th, all right. [121]

Q. (By Mr. Gang): The next item, if you look at the top of page 15, deals with an article given out by your department to the effect that Mr. Parsonnet, the writer, had completed revisions on the script and that it would be under the guidance of Executive Producer Robert Sparks. Does that refresh your recollection about that item?

A. Yes, it does.

Q. That was given out about the same date?

A. That is correct.

Q. You mentioned that these items to the trade

(Testimony of Perry Lieber.)

papers were given out by somebody in your department called a planter, p-l-a-n-t-e-r?

A. That is correct.

Q. That is derived from the fact that he plants the items?

A. He services to trade papers and newspapers.

Q. Mr. Nat James was the planter on "Carriage Entrance"? A. That is correct.

Q. Did the planter have any particular places in which to plant these articles?

A. Yes, indeed. They are designated to what sources they are to be planted. In other words, we try to service all the outlets, the newspapers, as well as the trade papers.

Q. Are there any particular columns which have somewhat special importance with your publicity department in [122] getting items planted?

A. It depends entirely upon the circulation of those items. We try to get the largest circulation we possibly can.

Q. What I meant was would your planter particularly try to get into Harrison Carroll's column or Erskine Johnson?

A. Erskine Johnson, Louella Parsons, Hedda Hopper, Edwin Schallert, right down the line.

Q. There are people who get wider circulation than others, and your effort is to get the widest circulation? A. That is correct.

Q. Look at page 16, which was the third one on it, which states Robert Stevenson will direct the film, and again states that Robert Sparks is the

(Testimony of Perry Lieber.)

executive producer. Do you remember that was issued about the same time as the other one, sometime about the middle of August, is that right?

A. That is correct.

Q. And you state that information was obtained by you from Mr. Sid Rogell?

A. That is correct.

Q. Thus far none of these items has mentioned the name of Polan Banks. Was there any reason for that, Mr. Lieber?

A. No, I do not recollect any reason that Polan's name was left out. In checking further, after giving my [123] deposition I find that I was called by Mr. Ross Hastings and said that there had been an objection to Mr. Banks' name not appearing in the copy, which we rectified immediately.

Q. Subsequently you included Mr. Banks' name?

A. That is right.

Q. If you look at line 19, on page 16, Mr. Lieber, there is an item there, there are two mentioned, one is August 8, 1949, which states that "Melvin Douglas reports to RKO," and the next one is August 12th, 1949, stating that "Ann Sheridan checks onto the RKO Radio lot tomorrow the 16th." Do you remember those releases?

A. I do, yes.

Q. And the 16th there meant August 16th, 1949?

A. That is correct.

Q. If you look on page 17, line 8, at that time in that item released to the trade papers you stated, and I will quote here, "For final fittings on her 21 changes of costume for 'Carriage Entrance' in

(Testimony of Perry Lieber.)

which she will be co-starred with Melvin Douglas. During the week she will also make camera tests of the wardrobe, designed by William Travilla in the 1890 style of New Orleans. Film to be directed by Robert Stevenson, has an August 22 starting date. Robert Sparks is executive producer." Do you remember that, Mr. Lieber? [124]

A. Yes, I do.

Q. That was the handout given at or about the 15th of August by your office?

A. That is correct.

Q. And the information you got was from Mr. Rogell?

A. Correct.

Q. At that time you had not been informed that any leading man had been signed by the defendant for that picture?

A. No, sir.

Q. Again on page 18, line 6, the date is August 15, 1949, which states that Harry Wild has been named cinematographer for "Carriage Entrance," do you remember that?

A. Yes, sir.

Q. You issued that on or about that date?

A. That is correct.

Q. And you also stated that Robert Sparks was the executive producer?

A. Yes, sir.

Q. The next item, if you look at page 18, line 18, is August 15, 1949, also listed "Trades," stating "Largest set to be constructed at RKO Radio in several years is now being built for use in upcoming Ann Sheridan-Melvin Douglas starrer, 'Carriage Entrance,' " and you further go on to state there that "Mr. Stevenson will direct, Polan Banks is

(Testimony of Perry Lieber.)

producer [125] while Robert Sparks is executive producer." That is the item you referred to before as having been cautioned about not mentioning Mr. Banks' name prior thereto?

A. That is correct.

Q. And you gave that statement out at or about that time? A. Correct.

Q. May I direct your attention to a memorandum from Mr. Margulies to you, which is mentioned on page 19, lines 19 to 24. I hope you have that with you. It is the one from you to Mr. Margulies, in which you said, "RKO Radio's 'Carriage Entrance' is described as a drama but it must be a fantasy—the two leading men jilt Ann Sheridan in it." Do you remember that?

A. I would have to get the copy. I haven't got it here, Martin. I can produce it. I would just like to state that all this copy is available. Why it is not here in my file I don't know. It is all available.

The Court: Do you have any recollection of that item counsel asked you about?

The Witness: Offhand I do not, no, sir. When I gave my deposition I had the article right there, your Honor.

The Court: Pass that matter up and bring your file in tomorrow.

Q. (By Mr. Gang): The next item is on page 20, Mr. Lieber, [126] line 7, dated August 16, 1949, also labeled "Trades," which reads as follows: "With RKO Radio's 'Carriage Entrance' rolling toward a start late this month, following assign-

(Testimony of Perry Lieber.)

ments have been made: William Dorfman as assistant director and Al Herman as art director. Robert Stevenson will direct the Ann Sheridan-Melvyn Douglas starrer for Producer Polan Banks, Robert Sparks is executive producer." Do you remember giving that out? A. Yes, I do.

Q. That was given out about the 15th or 16th of August? A. Correct.

Mr. Knupp: Which one, Mr. Lieber, do you know?

The Witness: On the 16th according to my deposition. I would like to point out that this copy is all available and has these dates. At the time of this deposition the copy was available and the date was on the copy.

Q. (By Mr. Gang): On the copy the date was August 16th? A. Correct.

Q. You would therefore state that was the date the article was given out by your department, August 16, 1949? A. Correct.

Q. At that date you had not yet been notified that anybody had been assigned to play the leading male role by the studio? [127] A. No, sir.

Q. There was another item which was mentioned at page 21, line 17, Mr. Lieber, dated September 24, 1948, and it was an article released by you. "Robert Young signed to co-star with Ann Sheridan in Polan Banks' picture 'Carriage Entrance' for RKO Radio release." Do you recall that, Mr. Lieber?

A. I do, yes.

(Testimony of Perry Lieber.)

Q. That was given out by your department about that date? A. That is correct.

Q. And your information that Mr. Young had been signed to co-star was from the front office?

A. From Mr. Rogell, I believe.

Mr. Knupp: Was that with respect to the Polan Banks production?

The Witness: Yes, sir. It is referred to in the copy as the Polan Banks picture.

Q. (By Mr. Gang): You had a file with what you call clippings, did you not?

A. I have that with me.

Q. Fine. You pointed out there were two separate sheets with clippings, is that right, in that file, two separate sheets?

A. There are several clippings.

Q. There is no distinction as between the two sets? [128] A. No.

Q. All right. This is one which I hope you have available. An article, in the left-hand corner of which it says, "Banks to produce own movie at RKO." Under that, under the heading, "Banks to Produce," was an article by Thomas F. Brady of the New York Times dated April 26, 1949; do you have that? If you look at your deposition you will remember that this item was one given out by your department. A. Yes, sir.

Q. I am referring to the one which starts off, "In settlement of Polan Banks' \$670,000 damage suit against RKO the studio purchased Banks' photoplay 'Carriage Entrance,' has taken over his

(Testimony of Perry Lieber.)

commitment with Ann Sheridan to star in it and has engaged Banks to produce the film." Do you find that?

A. It certainly must be here.

Q. April 26, 1949. Have you found it?

A. No, I haven't.

Q. Do you remember the article?

A. I do, yes.

Q. Do you remember the gist of it came from your office at or about that date, April 26, 1949?

A. What page is that on?

Q. Page 23, Mr. Lieber. You might read that whole [129] page because otherwise you might confuse yourself.

A. I am acquainted with it now.

Q. You don't have that particular clipping with you?

A. It may be here. I will get these all marked so I will have them marked for you tomorrow.

Q. We may not need you back here. I hope not. In any event, you do testify from your own recollection that about April 26, 1949, or shortly prior thereto, you gave out information with reference to the assumption by RKO of the "Carriage Entrance" project from Polan Banks?

A. That is correct.

Q. Including the statement that the studio has taken over his commitment with Ann Sheridan to star in it.

A. Correct.

Q. There is an item on that same sheet that says "Robert Young will do lead with Ann Sheridan,"

(Testimony of Perry Lieber.)

and it is marked in ink 7/7/49. Can you find that one in your file?

A. Where is that in the deposition?

Q. Page 23, line 24. I there identified it as the item on the sheet to the right. It is marked in ink 7/7/49. You said that was July 7th, '49. You might look at page 24 at about line 11 in which you testified at that time that you gave that information out.

A. I still am not sure that we gave that story out. You are referring to the one of Mel [130] Ferrer?

The Court: No, no.

Q. (By Mr. Gang): I am talking about the one which said "Robert Young will do lead with Ann Sheridan." A. What page is that on?

Q. Bottom of page 23.

The Court: Do you have any other witnesses after you get through with this witness tonight?

Mr. Gang: No.

The Court: Well, I suggest that we take an adjournment and give Mr. Lieber a chance to go over this file with you and find some of these matters and bring in tomorrow those other matters which he didn't bring today that you think are necessary. If they are matters that you already covered, I don't see any necessity for it.

Mr. Knupp: I suggest that Mr. Gang can give Mr. Lieber a statement now or before he leaves tonight, he can probably get it all together so he won't have to look through it.

Mr. Gang: If Mr. Lieber will go through the

(Testimony of Perry Lieber.)

deposition from where we left off today and get everything that we will need to finish up tomorrow and just pick up the item from the New York Times that we couldn't find, and two of those other items which I don't remember offhand what they were. You can check back and see.

The Court: You passed two matters, so you said. The first item you talked about was some item on August 11, 1949, [131] and the second one was some memorandum from Mr. Lieber to Margulies or Margulies to Lieber.

Mr. Gang: Yes, about the fantasy. Those two I would like to have you bring in, and the clipping from the New York Times, together with the other material from here to the end of the deposition.

The Court: I suggest that you spend some time with him this evening. I suggest you talk to him after court adjourns as to what you want.

Mr. Gang: I will be happy to.

The Court: We will take an adjournment at this time, ladies and gentlemen of the jury. The court admonishes you again of your duty not to converse or otherwise communicate among yourselves or with anyone on any subject touching the merits of this cause on trial. You are not to form or express any opinion on the case until it is finally submitted to you for your verdict. The jury may retire. Adjourned until 10:00 o'clock tomorrow morning.

(Whereupon the jury retired from the court room.)

The Court: Anything further tonight?

Mr. Gang: No.

The Court: 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken from Tuesday, January 30, 1951, until Wednesday, January 31, 1951, at 10:00 o'clock a.m.) [132]

Wednesday, January 31, 1951—10 A.M.

The Court: It is stipulated that the members of the jury are present and in their proper places?

Mr. Jeffers: So stipulated.

Mr. Gang: So stipulated.

The Court: Proceed.

PERRY LIEBER

called as a witness by and on behalf of the plaintiff, having been previously sworn, resumed the stand and testified as follows:

Mr. Gang: Mr. Lieber has brought with him this morning the file which was mistakenly left in his office by his secretary yesterday, and I have taken from it, your Honor, after discussion with Mr. Knupp, the documents with reference to which we had some discussion yesterday. In the interest of time and so we will avoid going over a great deal of the material we went over yesterday, I am going to offer as one exhibit the documents which I shall describe by date. I have arranged them in chronological order, and Mr. Knupp and I have agreed, subject to the court's approval, that these will be identified in evidence as one exhibit number. For

(Testimony of Perry Lieber.)

that purpose I therefore offer in evidence now these documents delivered to me by Mr. Lieber from his file. [134]

Mr. Knupp: If the court please, I have not yet seen the documents. I said that I would have no objection to their offer in evidence as one exhibit, but I would like to have them a few minutes to take a look at what Mr. Gang proposes to offer.

Mr. Gang: They are all the documents that we went over at the deposition. Do you want to look at them?

The Court: We will mark them now as Plaintiff's next in order, for identification. Is that 12, Mr. Clerk?

The Clerk: Yes.

(The documents referred to were marked Plaintiff's Exhibit 12 for identification.)

The Court: Do you want to look at them now or at a recess?

Mr. Knupp: I would like to look at them now to see if I should desire to cross-examine with respect to the particular instruments.

(Slight delay in proceedings.)

The Court: Any objection, Mr. Knupp?

Mr. Knupp: None, if the court please.

The Court: No. 12 for identification will be received in evidence, consisting of a series of written documents, memos, press releases, and so forth.

(The documents, heretofore marked Plaintiff's Exhibit 12, for identification, were received in evidence.) [135]

(Testimony of Perry Lieber.)

Mr. Gang: They begin, the first one is dated September 16, 1948; the next is September 24——

The Court: Just a minute. Are you going to read them to the jury?

Mr. Gang: Not at this time, your Honor.

The Court: All right. You are just identifying them by date?

Mr. Gang: Yes.

(Continuing): September 24, 1948; July 25, 1949; August 2, 1949; another August 2, 1949; another August 2, 1949; August 3, 1949; August 4, 1949; August 8, 1949; August 11, 1949; August 12, 1949; August 15, 1949; August 15, 1949; August 15, 1949; August 16, 1949; August 16, 1949; one doesn't belong, so I will give it back to Mr. Knupp.

Direct Examination

(Resumed)

By Mr. Gang:

Q. You have what is left of your file in front of you, do you, Mr. Lieber?

A. I do, yes, sir.

Q. There is no release with reference to "Carriage Entrance" in that file after August 16, 1949?

A. There are items here, yes, the 22nd, 28th, in this file.

Q. What items are those, Mr. Lieber? [136]

A. On the 22nd——

Q. Can you tell us what form it is in? Is it a clipping?

(Testimony of Perry Lieber.)

A. A clipping from the New York Herald Tribune dated——

Q. Was that given out by your office?

A. (Continuing): ——dated August 22nd.

Q. Was it given out by your office?

A. Let me read it here, and make sure.

No, it was not given out by my office.

Q. All you have left now are several cardboard sheets with clippings from newspapers on them, is that right? A. Correct.

Q. There are no releases or handouts or copies of documents given out by you or your department, is that right? A. Correct.

Q. So my statement is correct, then, so far as those items are concerned, August 16, 1949, is the last date? A. That is correct.

Q. May I direct your attention to a clipping there, Mr. Lieber, from the Los Angeles Mirror of July 7, 1949, to the effect that Robert Young will do the lead with Ann Sheridan; do you find it?

A. I do.

Q. Was that given out to the newspapers by the planter? A. It was. [137]

Q. And from whom did you get the information that Mr. Robert Young would do the leading male role with Ann Sheridan?

A. I believe it was from Mr. Rogell.

Q. It was at or about that date?

A. Correct.

Q. Will you direct your attention now to the Louella Parsons column in the Los Angeles Ex-

(Testimony of Perry Lieber.)

aminer of August 19, 1949, Friday of the week of August 15, 1949. Have you found that item?

A. Which one, the Mel Ferrer?

Q. No; the one of August 19th in which reference is made to a statement by a studio spokesman.

A. I believe this is the one, yes.

Q. Do you have that there?

A. I have, yes, sir.

Q. Will you read it, please, referring to "Carriage Entrance"? A. The headline from——

Mr. Knupp: Just a minute, if the court please. This proposed evidence is objected to on the ground it is incompetent and immaterial, on the ground it is hearsay so far as the defendant in this case is concerned, and not binding in any respect on the defendant.

The Court: At the present state of the record the [138] objection will be sustained.

Q. (By Mr. Gang): Mr. Lieber, when did you first learn that Ann Sheridan's contract of employment for "Carriage Entrance" had been terminated by RKO?

A. When I read the article in the paper.

Q. On Friday morning, August 19th?

A. That is correct.

Q. And the article you refer to, without giving its contents, was your first information that RKO had in effect fired Miss Sheridan?

A. That is correct.

Q. You did not get any information on Thursday, the preceding day, August 18th, from anybody

(Testimony of Perry Lieber.)

at the studio about Ann Sheridan, is that correct?

A. No, sir, I did not.

Q. Nor on the preceding Wednesday, August 17th?

A. No, sir.

Q. And you did not give out the information which the article in question purportedly contains?

A. I did not.

Q. You were therefore not the studio spokesman named in that article?

A. That is correct.

Mr. Knupp: Just a minute, if the court please. There is nothing in the record so far with respect to what is in the [139] article. I understand my objection was sustained by the court.

The Court: There is, through the questioning, a general reference that the article indicated she had been fired and discharged or terminated, or something. Is your objection to a particular question now? What is the question pending?

Mr. Knupp: My objection, if the court please, to the question is based upon the fact that it refers to something contained in an article which is not in evidence before the jury.

The Court: Read the question, Mr. Reporter.

(The record was read by the reporter.)

Mr. Knupp: I move to strike the answer, if the court please.

The Court: The answer may go out and the objection will be sustained. I think the evidence heretofore taken in this series of questions makes it clear that this witness had no knowledge of the

(Testimony of Perry Lieber.)

termination or the firing. That is all you wanted to prove, wasn't it?

Mr. Gang: If the court please, I prefer to have the jury know what the article says, to make more sense. You sustained the objection to that. I had to do it backwards.

The Court: I sustained an objection on the ground there was no showing that this defendant or this executive of the defendant issued the story, and in fact your testimony has [140] demonstrated that he didn't issue the story. In fact, he knew nothing about it until he read it.

Mr. Gang: That is the point I want to make, your Honor, which is proving a negative.

The Court: You have already made it. There is no dispute about that.

Mr. Gang: Thank you.

Q. (By Mr. Gang): Did you find out who wrote the article in question with reference to which we have been talking? A. No, sir, I did not.

Q. Did you ever talk to Dorothy Manners,

A. Yes, sir, I have. Pardon me. Did you say who wrote the article, or gave it out?

Q. Who wrote it?

A. I found out who wrote the article.

Q. Who did write the article?

A. Dorothy Manners.

Q. Did you make an effort to find out who gave out the article? A. No, sir, I did not.

Q. You don't know to this date who did?

A. I do not.

(Testimony of Perry Lieber.)

Q. Can you tell us on what day the information contained in the article which appeared in the Examiner on Friday [141] morning, August 19th, had to be given to Miss Manners so that it could appear on that day?

A. Usually it is two days ahead of the publication date. If it was to appear on the 19th, in other words, it would be secured on the 17th. Their deadline is 3:00 p.m. in the afternoon. However, in further checking this story with Miss Manners, she stated that she rewrote the lead on her column after securing the attached story.

The Court: Of course this is hearsay, but nobody objects to it. I don't think it is too material.

Mr. Gang: No objection on my part.

Q. (By Mr. Gang): Go ahead, Mr. Lieber.

A. So the usual deadline rule on this story does not hold. She maintains, Miss Manners, that she received this information around 9:00 or 9:30 p.m. the night, I believe, of the 17th.

Q. Of August? A. That is correct.

Q. When you spoke to her did you ask her who gave her that information? A. I did not.

Mr. Gang: If the court please, I would like to renew at this time the offer in evidence of the article, not for the truth of what appears therein, but so the jury may know that such an article did appear so that the questions asked of the [142] witness will relate to the particular item, without asking the jury to believe that what was said there was true or not.

(Testimony of Perry Lieber.)

The Court: It appears inferentially in the record that the article was an article indicating that Miss Sheridan had been fired or terminated. That is all you want, isn't it?

Mr. Gang: I would want the whole article, because it is attributed to a studio spokesman, and I want the jury to have that before them. Not that it is true.

The Court: At best your offer could only go as far as the court has stated, namely, what the substance of it was. What somebody's comment on it was, arguing it back and forth, and all that sort of thing, would clearly not be competent.

Mr. Gang: My offer is limited only to the fact that on that date that item appeared. Not as to the truth of what is in it.

The Court: That is already in the record, I think, sufficiently for a jury to understand the rest of the testimony. The objection is sustained.

Q. (By Mr. Gang): Is there such a thing as newspaper ethics which prevented you from asking Miss Manners from whom she got the information?

A. There is.

Q. You have known Miss Manners for some time? [143]

A. Many years, yes, sir.

Q. And in your opinion is she an honest and competent newspaper woman?

Mr. Knupp: That is objected to, if the court please, as incompetent. I will stipulate that she is

(Testimony of Perry Lieber.)

an honest and competent newspaper woman. We are not going to bring Miss Manners' reputation into this case, I trust.

The Court: I will sustain the objection. We are getting pretty far afield.

Mr. Gang: I want to ask this witness if a statement attributed to a studio spokesman could be believed if appearing in Miss Manners' column.

The Court: Objection sustained, Mr. Gang.

Q. (By Mr. Gang): Will you look in your clippings, Mr. Lieber, and tell me what the first date is on which you issued any statement about Robert Mitchum appearing in the picture "Carriage Entrance"? I will direct your attention to an item in Harrison Carroll's column dated September 9, 1949.

A. Do you want me to read this?

The Court: The question was what was the date of the first release by the defendant of the name of Robert Mitchum in connection with "Carriage Entrance."

The Witness: The story referred to here was not given out by the studio. [144]

Q. (By Mr. Gang): Did you see the story when it appeared and when you clipped it?

A. Yes, sir.

Q. Did you ascertain whether the item was correct? A. I did.

Q. Was it correct? A. It was.

Q. When did you first learn that the picture was proceeding in production with Ava Gardner

(Testimony of Perry Lieber.)

portraying the leading female role in place of Ann Sheridan?

The Court: Before we go to that, so the record may be clear, when did you first learn that Robert Mitchum was going to play the male lead in "Carriage Entrance"?

The Witness: I am not sure of that date, your Honor, the exact date.

Q. (By Mr. Gang): With reference to September 9th, it will be close enough. How many days before that or after that?

A. I would say it would be right around that period. I can't give a definite date.

The Court: You said you checked something. Was that on or about September 9th?

The Witness: That is the 9th.

The Court: September 9, 1949?

The Witness: That is correct. [145]

The Court: Read the question now about Miss Gardner.

(The question referred to was read by the reporter as follows: "When did you first learn that the picture was proceeding in production with Ava Gardner portraying the leading female role in place of Ann Sheridan?")

The Witness: On or about September 9th.

Q. (By Mr. Gang): Again, Mr. Lieber, how many days prior to September 9th would that information have to be given to Mr. Carroll so as to appear in the newspaper dated September 9th?

(Testimony of Perry Lieber.)

A. The day before, the 8th.

Q. Will you look in your clipping file for the Louella Parsons column in the Los Angeles Examiner of September 12, 1949, relating to a story that Ava Gardner steps into Ann Sheridan's spot in "Carriage Entrance," and gets Robert Mitchum as her leading man? September 12th is the date.

A. Yes, sir, I have that.

Q. Was that information given to Miss Parsons by you or anybody in your department?

A. I don't believe so.

Q. You have no knowledge yourself as to how Miss Parsons got that information?

A. Is it permissible to read the article? It explains itself.

Q. I would like it to be read, but I don't wish to [146] infringe on the patience of the court who has ruled against me twice. I think that is enough. If Mr. Knupp still objects, you cannot read it, because I won't offer it again.

Mr. Knupp: There has been no offer of anything yet, if the court please.

The Court: Mr. Knupp, the witness has inquired whether he may read the article, and you are eloquent by your silence presently. What is your view?

Mr. Knupp: My objection which goes to the prior article which was written in the column by Dorothy Manners is also made with respect to this article which apparently on its face is hearsay. It didn't originate with the studio.

The Court: If there is no showing that it origi-

(Testimony of Perry Lieber.)

nated from the defendant or one of its employees or executives, then the objection is good. The objection will be sustained.

Q. (By Mr. Gang): Would the same thing be true—by that I mean would the same fact be true that you did not issue to Mr. Edwin Schallert any information which appeared in his article in the Los Angeles Times on September 13, 1949, with reference to Mitchum, Gardner, and Melvin Douglas in “Carriage Entrance”?

A. That information could be obtained from the studio, yes.

The Court: The question is did you or did you not issue the information on which the article was based. [147]

The Witness: There was an article issued by the studio, I wish I had that here, on or about that date. These articles that appear here in clippings you can say are rewrites from that original source, from the statement issued by the studio.

Q. (By Mr. Gang): Is there anything in that file to show when you issued your first statement with reference to Mr. Mitchum and Miss Gardner appearing in the picture? I say, again, I don't wish to confuse you. My notes indicate that at your deposition you did have available the release dated September 13, 1949. It is not in that batch and wasn't in the batch you gave me; that is why I asked.

A. Buddy, will you see if you got that in your file?

(Testimony of Perry Lieber.)

(Addressing a person in the audience.)

A Voice: I believe that was in your file, a spot news.

Q. (By Mr. Gang): I didn't list any date beyond August 16th, so it isn't in the batch I handed in. Will you see if it was left in your file?

Mr. Knupp: If the witness testifies that the studio did release something as of that date that Gardner and Mitchum were to appear in the picture, we have no objection to it, then.

The Court: Is that satisfactory?

Mr. Gang: Yes.

The Court: It was on that release of September 13 that certain articles appearing in the papers were based, the facts [148] were based on that release?

The Witness: Yes.

The Court: Which articles were based on that release?

The Witness: The two referred to here, the Parsons story and the Schallert story.

The Court: The Parsons story being the one which I think you said was September 12th?

The Witness: That is correct.

The Court: And the Times article was September 13th?

The Witness: Correct. Our release would have had to take place before that, due to the fact that one of the clippings has already been printed, that is the way it reads here.

(Testimony of Perry Lieber.)

Q. (By Mr. Gang): I don't want to belabor the point, but according to your best recollection, Mr. Lieber, sometime in the neighborhood of September 9, 1949, information either leaked to the press or was given to the press by your department with reference to "Carriage Entrance" being made with Robert Mitchum, Ava Gardner, and Melvin Douglas?

A. A spot news release was given out by the studio approximately that time.

The Court: What do you mean by "that time"? Counsel has said somewhere on or about the 9th of September, or thereafter. When was this release?

The Witness: It would have to be around that time, [149] September 9th or 10th, along in there, sir.

Mr. Gang: Thank you, Mr. Lieber. Cross-examine.

Cross-Examination

By Mr. Knupp:

Q. Your function at the studio, Mr. Lieber, is concerned exclusively with publicity matters?

A. That is correct.

Q. You have nothing to do with contracts which are made by the studio for the services of artists?

A. I do not.

Q. Or directors or anything else?

A. No, sir.

Q. So far as your knowledge of any action which was taken by the executives charged with the

(Testimony of Perry Lieber.)

function of performing those duties is concerned, your only information would come after the action had been taken? A. That is correct.

Mr. Knupp: That is all.

Mr. Gang: No further questions, your Honor.

The Court: You may step down, sir. Thank you.

Mr. Gang: The witness may be excused as far as the plaintiff is concerned.

The Court: May he be excused, Mr. Knupp?

Mr. Knupp: Yes, Mr. Lieber may be excused.

The Court: You may be excused, Mr. Lieber. You can go [150] back and write press releases now.

Mr. Gang: I next call Mr. Schuessler, casting director of RKO.

May the record show, your Honor, that the witness is called under Rule 43(b).

The Court: Under 43(b) of the Rules of Civil Procedure.

FRED SCHUESSLER

called as a witness by the plaintiff under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Fred Schuessler.

Direct Examination

By Mr. Gang:

Q. You live in Los Angeles, do you not?

A. Yes, sir.

(Testimony of Fred Schuessler.)

The Court: The jury understands what is meant by calling the witness under 43(b), an executive or officer of the defendant corporation, the same manner in which Mr. Lieber was called. Proceed.

Q. (By Mr. Gang): You have lived here many years, have you, Mr. Schuessler?

A. Twenty-eight years.

Q. How long have you been employed by RKO?

A. Two years.

Q. And in what capacity?

A. Casting director.

Q. Can you state briefly what your functions and duties are as casting director?

A. We read the scripts or the stories as they are purchased by the studio and ready for production, make suggestions and recommendations for the various parts.

Q. Do you do anything beyond making recommendations?

A. After the actor for that particular part is approved we then make a deal with the actor direct or an agent if he has one.

Q. And when actors are employed by other studios, who makes the contact, if I may use that word, with the other studios?

A. The casting office.

Q. In the case of RKO, that means you?

A. Not always. It could be one of the other men in the office, my assistants.

Q. My questions will be directed to the period of time from April 29, 1949, to August 16, 1949,

(Testimony of Fred Schuessler.)

and unless otherwise indicated it will be that period of time with reference to which you are questioned. You have a file in your department, do you not, Mr. Schuessler, in which you keep notes, memoranda, and other documents with reference to [152] particular pictures?

A. Yes, every picture that is made.

Q. And you had such a file with reference to "Carriage Entrance"? A. I have.

Q. You have brought that with you, have you?

A. Yes, sir.

Q. I think you keep notes in there which you make yourself? A. Yes, sir.

Q. With reference to various matters that come up in the making of a picture, is that right?

A. Yes, sir.

Q. Now, what is the first date on which you functioned with reference to "Carriage Entrance"?

A. I don't think I can tell you that.

Q. Well, if you don't remember it, what is the first date that your file shows you functioned on "Carriage Entrance"?

A. I don't think so.

The Court: Is the file in chronological order, or just this way (indicating)?

The Witness: Helter-skelter. There is no date on this first list of suggestions that was made up.

Q. (By Mr. Gang): Before I get into that, in the chain [153] of command in RKO who is your superior, your immediate superior?

A. My immediate superior was Sidney Rogell.

(Testimony of Fred Schuessler.)

Q. And unless otherwise indicated you got your suggestions or discussed them with Mr. Rogell?

A. With Mr. Rogell.

Q. Did you ever talk to Howard Hughes?

A. Oh, yes, sir.

Q. How would that be, in person or by phone?

A. In person and by phone both.

Q. And if you talked to him in person where would you see him?

A. At the Goldwyn Studio in his office, or the aircraft plant if he was engaged in the aircraft business on that particular day, which he is most of the time, or at the hotel where he was residing.

Q. But never at RKO studios?

A. No, sir.

Q. Your first list of suggestions bears no date, you said.

A. No, sir.

Q. Does it refresh your recollection as to any discussion you had with Mr. Rogell about the subject-matter?

A. As to the casting?

Q. Yes. [154]

A. No, sir.

Q. Is that the list you showed me heretofore in which the name of Robert Young appears and which was crossed out?

A. Yes, that is on the budget detail, I take it, is that the one you mean?

Q. May I look at it and see if that is the one I mean?

A. Yes.

Q. Yes, it does have a date.

A. That is July——

Mr. Knupp: Might I suggest this, if the court

(Testimony of Fred Schuessler.)

please? I think Mr. Gang is thoroughly familiar with the file, he has been through it before, it might be of assistance if he had the file before him and selected those items that he wanted to interrogate the witness about.

Mr. Gang: Thank you. That would save me some walking.

The Court: You may do it here or at the witness chair, or at the lectern.

Mr. Gang: I think I would drop my voice if I stand too close.

The Court: Mr. Schuessler, you need not feel bad about that file. There are lots of lawyers who keep them that way.

The Witness: There is too much confusion at the studio [155] to try to keep them in chronological order always.

Q. (By Mr. Gang): The document you handed me is not the one that I had in mind first. I find that it is this yellow sheet of paper which is the one I had reference to.

A. That is the one that bears no date, that is the first sheet we start working on when we make the suggestions.

Q. And this is in your own handwriting?

A. Yes, sir.

Q. And it was made sometime after April 29, 1949?

A. If that is when the script came through, it would be right after the script was received from the script department.

(Testimony of Fred Schuessler.)

The Court: Was the script received before or after the contract was executed with Ann Sheridan? The contract was executed April 29, 1949; do you know when the script came in, before or after that date?

The Witness: No, sir, I do not know.

Q. (By Mr. Gang): It would be your best recollection that you wrote this down sometime after April 29, wouldn't it? A. Yes, sir.

Q. Is it your recollection that all of these names were written down at the same time, or did you add names from time to time?

A. They were added from time to time. [156]

Q. I call your particular attention, Mr. Schuessler, to the writing in ink of "F. Tone," with "r-a-n-c-h-o-t" written in pencil.

A. What was the notation in pencil?

Q. I will show it to you.

The Court: Are you going to offer this document in evidence?

Mr. Gang: Yes, your Honor.

The Court: Let's give it a number for identification.

The Witness: "Franchot," I spelled out his first name.

The Court: This yellow sheet about which there has been some testimony will be marked Plaintiff's 13 for identification.

Mr. Gang: I might offer it in evidence at this time, your Honor, so we need not have it for identification.

(Testimony of Fred Schuessler.)

The Court: All right. In evidence. Then if we refer to it as Exhibit 13 the record will show what we are talking about, rather than this paper, this document, or this yellow sheet.

Mr. Gang: Thank you.

(The document referred to was marked Plaintiff's Exhibit 13, and was received in evidence.)

Q. (By Mr. Gang): With reference to Plaintiff's Exhibit 13 you testified that the name of Franchot Tone was in your [157] handwriting?

A. Yes, sir.

Q. It precedes the name of Robert Young in the column, and the name of Robert Young is crossed out; can you at this time from looking at Plaintiff's Exhibit 13 tell me when you crossed out Robert Young's name?

A. That would be hard to say. That could be any time after I learned that he wasn't going to play the part.

Mr. Gang: With your permission may I ask some questions from this point, your Honor?

The Court: You may. Keep your voice up and the witness will keep his voice up, as well. That is the worst trouble with examining the witness at close range; you tend to whisper to each other.

Q. (By Mr. Gang): In drawing up this list I notice it begins with a man named Brady and seems to proceed more or less alphabetically for part of the way, is that correct?

A. That's right.

(Testimony of Fred Schuessler.)

Q. In fact, the alphabet seems to run down through Robert Young, is that right?

A. Correct.

Q. After Robert Young there are other names entered, such as Richard Conte. Do you remember that occasion? Will you read it, Mr. Schuessler?

A. Do you wish to know the reason for adding these [158] names after Robert Young's, is that it?

Q. If it is helpful, yes.

A. Those names are suggestions that are given to us by the agents or they are suggested to us by articles we might read in the trade papers, or they could be phoned in by the producer, the director, or anybody interested in the picture.

The Court: It is just a preliminary work sheet?

The Witness: That's it.

Q. (By Mr. Gang): I show to you, Mr. Schuessler, on Plaintiff's Exhibit 13 opposite the name of Richard Conte, C-o-n-t-e, the notation "Send script."

A. When I checked on Richard Conte he was under contract to Twentieth Century-Fox, they were not certain that he was available, they had other things in mind, as I recall, for him on their home lot, on his home lot, but it is quite evident that if they would have liked the part in our script he would have been available to us.

Q. First, with reference to Richard Conte, who suggested his name to you?

A. I am not certain about that.

Q. Could it have been Mr. Sparks?

(Testimony of Fred Schuessler.)

A. It could have been.

Q. Or Mr. Rogell?

A. It could have been anyone. It could have been the [159] agent.

The Court: What agent?

The Witness: The agent for Conte. He has an agent, as well as the studios.

The Court: Every actor has to have an agent, does he?

The Witness: They usually have, most of them, yes. 95 per cent of them.

Mr. Knupp: 95 per cent of them have a 10 per cent agent.

Mr. Gang: I detect a note of jealousy in Mr. Knupp's voice.

Q. (By Mr. Gang): Do you remember to whom you spoke at Twentieth Century-Fox with reference to Mr. Conte?

A. Mr. Bill Gordon in the casting office.

Q. It was he who asked you to send over a script?

A. Yes, sir.

Q. You use the word "script" to mean story or screen play in which the actor would appear?

A. Right.

Q. That is for the purpose of having the lending studio consider the part?

A. Correct.

Q. Did you communicate to Mr. Rogell or any other superior at RKO the request of Mr. Gordon? Did you tell anyone that Mr. Gordon at Fox requested a script of "Carriage [160] Entrance" to be sent over to him?

(Testimony of Fred Schuessler.)

A. Yes, sir, I told Mr. Rogell.

Q. Was a script sent? A. No, sir.

Q. Did you inquire of Mr. Rogell again?

A. Not to my knowledge, no, I don't think I did.

Q. So far as Richard Conte was concerned that was the end of it? A. Yes, sir.

Q. I call your attention to the fact that the last name on the list is Charles Boyer, C-h-a-s you have it. Is that your handwriting, too?

A. Yes, sir.

Q. Do you remember when you put that name down?

A. That was the last name added to the list in Mr. Rogell's office.

Q. That was on Tuesday, August 16, 1949, was it not?

A. I really couldn't tell you the date.

Q. But it was a meeting at which Miss Sheridan and Mr. Hickox and Mr. Rogell were present?

A. Right.

Q. Did you do anything about seeing whether Mr. Boyer was available?

A. He was definitely available. I knew that without checking. [161]

Q. Did you check after you left Mr. Rogell's office? A. No, sir.

Q. Did you discuss the possibility of John Lund playing the leading male role in "Carriage Entrance"? A. Very definitely.

Q. And with whom did you discuss it?

(Testimony of Fred Schuessler.)

A. Mr. Hughes, Mr. Rogell.

Q. And in that discussion was anything said about who suggested Mr. Lund? A. No.

Q. What did you do about it?

A. Called the studio, Paramount, where he is under contract, to ascertain his availability, and they said that he was definitely available if we had a good part for him, and if we were interested enough in his services to send a script.

Q. Did you send a script to Paramount?

A. We sent a script.

Q. What happened?

A. Two days later they called us and told us that Mr. Lund was not available.

Q. Did they tell you why?

A. I asked them why and they said because they didn't think the part was worthy of his talents.

Q. And it is your recollection that this was after Mr. [162] Young had turned the part down?

A. Yes.

Q. Why didn't you send a script to Twentieth Century-Fox on Conte?

A. Because we didn't get an approval from the executives on sending it.

The Court: Whose executives?

The Witness: Mr. Rogell in this particular case, or Mr. Hughes.

The Court: In other words, they asked for a script but because you didn't receive authority to send it you didn't mail it?

(Testimony of Fred Schuessler.)

The Witness: That's right. There wasn't sufficient interest in Conte to send a script to Fox.

The Court: Sufficient interest by your superiors?

The Witness: That's right.

Q. (By Mr. Gang): I don't notice Van Heflin's name here, although there was some discussion about Van Heflin. Is there any reason for that absence from this sheet?

A. If it isn't on that sheet it is on one of the others. I know his name was definitely considered.

Q. Let me ask you, did you cross Robert Young's name out? A. Oh, yes, sir.

Q. Did you check with reference to the availability of [163] Franchot Tone?

A. No, I didn't have to check because he was on the lot at the time, and I saw him every day, practically. He had just returned from Paris where he had finished a picture over there and he was finishing the picture on our lot.

Q. Did you discuss with Mr. Hughes the possibility of casting Mr. Tone in the part?

A. No, sir.

Q. Or with Mr. Rogell? A. No, sir.

Q. Did you tell them that his name was on your list as suitable actors for that role?

A. They were subsequently sent a list——

Mr. Knupp: Just a minute, Mr. Gang. That question is objected to in its present form. I don't think there is any evidence yet that this list constitutes people that were considered as suitable

(Testimony of Fred Schuessler.)

actors. They were considered as possible prospects for the role.

The Court: Let's have the question read, Mr. Reporter.

(The question referred to was read by the reporter as follows: "Did you tell them that his name was on your list as suitable actors for that role?")

The Court: The question is a little ambiguous. Whether it means what he said to them or whether it means his interpretation of the list is a question. The objection will be [164] sustained on the ground of ambiguity and uncertainty.

The Witness: Certain actors——

The Court: Just a minute. There is no question pending now.

Mr. Gang: Read the question again.

(The question was reread by the reporter.)

Mr. Gang: I will reframe it.

Q. (By Mr. Gang): Did you discuss with Mr. Rogell the suitability of Mr. Tone for the role?

A. No, sir.

Q. Did you ever show them this list which you had made up with his name on it?

A. I sent them a subsequent list. I don't know whether his name appeared on it or not.

Q. You are referring to a typewritten list, Mr. Schuessler? A. That's it.

Q. Before I question you I will show you this from your file and see if this is the one you mean.

(Testimony of Fred Schuessler.)

A. That's it.

The Court: Is that another document, counsel?

Mr. Gang: Yes, I am going to offer this in evidence as Plaintiff's Exhibit 14.

The Court: Plaintiff's 14 in evidence. [165]

(The document referred to was marked Plaintiff's Exhibit 14, and was received in evidence.)

Q. (By Mr. Gang): Plaintiff's 14 is a photostatic copy, your Honor, of the original typewritten sheet, which you say was prepared in your office, Mr. Schuessler?

A. Yes, sir.

Q. And it relates to the part called Quentin?

A. Right.

Q. Your first notation is "Van Heflin—may be available about 9/1"; that is September 1, 1949?

A. Yes, sir.

Q. Is that as far as you had gone in discussions with reference to Mr. Heflin?

A. That is correct.

Q. Had any discussions been instituted with his studio with reference to borrowing him?

A. Yes, sir, I talked to Mr. Grady in the casting office.

Q. And from him you found out the first available date was September 1, 1949?

A. Right.

Q. Did they ask for a script?

A. No, sir.

Q. Did you ever send one?

A. No, sir. [166]

Q. Do you remember when you prepared this exhibit, Plaintiff's Exhibit 14?

(Testimony of Fred Schuessler.)

A. Do I remember——

Q. When did you type this up, if you remember?

A. There should be a date on it.

Q. The only one is the one that the reporter at the deposition put down, which wouldn't be helpful.

A. I am sorry. We usually put dates on those notes or lists.

Q. Plaintiff's Exhibit 14 has in handwriting opposite three names Nos. 1, 2, and 3, No. 1 being opposite Robert Preston, No. 2 opposite Richard Basehart, No. 3 opposite Robert Ryan; did you put those numbers down, Mr. Schuessler?

A. Yes.

Q. Do you remember when you put the numbers down?

A. I don't know the exact time, but it was after one of my discussions with Mr. Rogell and possibly Mr. Sparks, the producer, and perhaps Mr. Polan, associate producer.

Q. What did those numbers mean to you when you put them down?

A. That was their preference, in that order.

Q. For the part?

A. For the part of Quentin, yes.

Q. At that time did you discuss with them the name of Franchot Tone, which was on this list, Plaintiff's Exhibit 14? [167]

A. No, sir.

Q. Did you discuss with them at that time the name of Mel Ferrer, which is on this list?

A. It is difficult to say, because his name was discussed so many times. Whether we did at this

(Testimony of Fred Schuessler.)

particular time or not I don't know.

Q. You have made available a photostatic copy of a sheet entitled "Budget Detail" from your files.

I will offer this in evidence as Plaintiff's next in order.

The Court: Received in evidence as Plaintiff's Exhibit 15.

Mr. Knupp: May I see it, please?

(Document handed to counsel.)

(The document referred to was marked Plaintiff's Exhibit 15, and was received in evidence.)

Q. (By Mr. Gang): Plaintiff's Exhibit 15 bears the date of July 13, 1949. Can you state whether this was prepared in your office or in the office that prepares the proposed budgets?

A. It was prepared in the budget department of the production office.

Q. Before I question you, I would like you to look at it, Mr. Schuessler. I particularly direct your attention to item No. 13 dealing with the part of Quentin. [168]

A. Yes, sir.

Q. Item No. 1 with reference to the character of Barbara has Ann Sheridan's name opposite it, is that right?

A. Yes.

Q. Item No. 2, the character Paul, has M. Douglas?

A. Yes.

Q. Item No. 3, the character Quentin, the first name written in was Robert Young, is that right?

A. Right.

(Testimony of Fred Schuessler.)

Q. And it was crossed out. Who crossed it out?

A. I did.

Q. And the name of Tone, T-o-n-e, is written in the place of Robert Young?

A. Not in the place of Young. There are two or three other names on there, too.

Q. I will get to those.

A. I am sorry. Yes, it was.

Q. His name is the first name which appears?

A. The first of several names, yes.

Q. And that is your handwriting? A. Yes.

Q. Now, with reference to the time that you crossed out Mr. Young's name and put in Mr. Tone's name, can you give us that time? Bear in mind that Plaintiff's Exhibit 15 bears the date July 13, 1949. [169]

A. It could have been very shortly after this particular date.

Q. It was sometime after July 13, 1949?

A. Yes, sir.

Q. Is your recollection refreshed as to why and how you came to put the name of F. Tone in for the part of Quentin?

A. I ascertained that from the meetings that I had with Mr. Sparks and/or Mr. Rogell, and Mr. Banks.

Q. Can you tell us what they told you?

A. No, I couldn't exactly tell the words any more. They just probably said that they were interested in Franchot Tone.

Q. You did say before that you would not put

(Testimony of Fred Schuessler.)

that in unless instructed by your superiors, is that right? A. The name of Tone?

Q. In this place here.

A. Oh, no, no. I could put that in without any instructions from anyone.

Q. But in this case you did have discussions with Rogell? A. Yes, frequent.

Q. And at this time the name was put in by you after such discussions, is that right?

A. Yes, I am sure it was. [170]

Q. There is also the name "W. C-o-r-y"; would that be Wendell Cory? A. Yes.

Q. Did you write that in? A. Yes.

Q. Did you strike it out? A. Yes.

Q. There is also "Carlson"; is that your handwriting? A. Yes.

Q. There is a "D" and something which I cannot read.

A. That is not unusual. Nobody can read my writing. "D" Niven, that is for David Niven, N-i-v-e-n.

Q. With reference to Mr. Cory, Mr. Carlson and Mr. Niven, did you discuss those names with Mr. Rogell or Mr. Sparks?

A. With one or all of them.

Mr. Gang: It is about 11:00 o'clock, and this is a good time to break for me, your Honor.

The Court: Ladies and gentlemen of the jury, we will take a recess at this time. The court admonishes you of your duty not to converse or otherwise communicate among yourselves or with anyone

(Testimony of Fred Schuessler.)

else upon any subject touching the merits of this cause. You are not to form or express any opinion on the case until it is finally submitted to you for your verdict. The jury may retire. [171]

We will take a short recess.

(A recess was taken.)

The Court: Stipulated that the jury are present and in their proper places?

Mr. Gang: So stipulated.

The Court: Proceed.

Mr. Gang: Mr. Lieber obtained the release dated September 13, 1949, which was missing earlier, and Mr. Knupp has agreed that we may stipulate that it may be added to and become a part of Plaintiff's Exhibit 12 in proper chronological order.

The Court: All right. What is the date of that release?

Mr. Gang: September 13, 1949.

The Clerk: I have attached it, your Honor.

Q. (By Mr. Gang): During the recess I went through the files and picked out just those items which are of interest here, so we wouldn't have to take up the court's time, and I will go through them in order.

The first is a sheet which bears some handwriting which I understand is that of your assistant Mr. Stockton?

A. That is correct.

Q. And it relates to Ann Sheridan?

A. Right.

Q. And it says, "15 weeks, 7-6" meaning July 6, "until Oct. 18th"? [172]

(Testimony of Fred Schuessler.)

A. That is the starting date, yes, of the 15 weeks, ending October 18th.

Q. In other words, under the contract the 15 weeks of employment which began on July 6th would end on October 18th, 1949?

A. I presume so.

Q. Do you remember what the proposed shooting schedule for the picture was?

A. No, but you will find it on that budget detail.

Mr. Gang: At this time we offer this sheet in evidence, your Honor, as Plaintiff's next in order.

The Court: The sheet about which you just interrogated the witness will be received as Plaintiff's 16. If you mark them first, then your record will show what you are talking about.

(The document referred to was marked Plaintiff's Exhibit 16, and was received in evidence.)

Mr. Knupp: May I ask Mr. Gang what was the date on which that indicated the picture would be completed?

Mr. Gang: October 18, 1949. Is that correct?

The Witness: Mr. Knupp asked the date the picture would be completed. That October 18th date is not exactly the date the picture would be completed. That's the end of the 15-week guarantee, I think, on Miss Sheridan's contract, wouldn't you say? [173]

Mr. Gang: I will accept that.

The Witness: Not having a calendar, offhand I would say that would be it. The picture could be

(Testimony of Fred Schuessler.)

completed two or three or four weeks prior to that time.

Mr. Knupp: Or two or three or four weeks subsequent.

The Witness: That's true, too.

Mr. Gang: Your Honor, all of these documents have been examined by Mr. Knupp, so I won't show them to him first. I shall offer next in evidence a typewritten document consisting of two pages entitled "Cast Carriage Entrance."

The Court: It will be received as Plaintiff's 17.

(The document referred to was marked Plaintiff's Exhibit 17, and was received in evidence.)

Mr. Gang: I won't repeat that all of these are from Mr. Schuessler's file. Your Honor, I would also at this time prior to questioning the witness offer as Exhibit 18, Plaintiff's 18, a document entitled "Important Communication" to Howard Hughes from Fred Schuessler, dated August 4, 1949.

The Court: Received as Plaintiff's 18.

(The document referred to was marked Plaintiff's Exhibit 18, and was received in evidence.)

Mr. Gang: Next in order as Plaintiff's Exhibit 19, dated 8/4/49, which also was obtained from the files of defendant.

The Court: What kind of a document is it—a memo?

Mr. Gang: A photostatic copy of a typed memorandum. [174]

(Testimony of Fred Schuessler.)

A. That is the starting date, yes, of the 15 weeks, ending October 18th.

Q. In other words, under the contract the 15 weeks of employment which began on July 6th would end on October 18th, 1949?

A. I presume so.

Q. Do you remember what the proposed shooting schedule for the picture was?

A. No, but you will find it on that budget detail.

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Mr. Gang: October 18, 1949. Is that correct?

The Witness: Mr. Knupp asked the date the picture would be completed. That October 18th date is not exactly the date the picture would be completed. That's the end of the 15-week guarantee, I think, on Miss Sheridan's contract, wouldn't you say? [173]

Mr. Gang: I will accept that.

The Witness: Not having a calendar, offhand I would say that would be it. The picture could be

(Testimony of Fred Schuessler.)

completed two or three or four weeks prior to that time.

Mr. Knupp: Or two or three or four weeks subsequent.

The Witness: That's true, too.

Mr. Gang: Your Honor, all of these documents have been examined by Mr. Knupp, so I won't show them to him first. I shall offer next in evidence a typewritten document consisting of two pages entitled "Cast Carriage Entrance."

The Court: It will be received as Plaintiff's 17.

(The document referred to was marked Plaintiff's Exhibit 17, and was received in evidence.)

Mr. Gang: I won't repeat that all of these are from Mr. Schuessler's file. Your Honor, I would also at this time prior to questioning the witness offer as Exhibit 18, Plaintiff's 18, a document entitled "Important Communication" to Howard Hughes from Fred Schuessler, dated August 4, 1949.

The Court: Received as Plaintiff's 18.

(The document referred to was marked Plaintiff's Exhibit 18, and was received in evidence.)

Mr. Gang: Next in order as Plaintiff's Exhibit 19, dated 8/4/49, which also was obtained from the files of defendant.

The Court: What kind of a document is it—a memo?

Mr. Gang: A photostatic copy of a typed memorandum. [174]

(Testimony of Fred Schuessler.)

The Court: Plaintiff's 19 in evidence.

(The document referred to was marked Plaintiff's Exhibit 19, and was received in evidence.)

Mr. Gang: As Plaintiff's 20 we offer a photostatic copy of a handwritten memorandum entitled "Richard Conte—Carriage Entrance."

The Court: Received as Plaintiff's 20.

(The document referred to was marked Plaintiff's Exhibit 20, and was received in evidence.)

Mr. Gang: As Plaintiff's 21, a copy of an "Important Communication" to Howard Hughes from Fred Schuessler, dated August 3, 1949, that is, 8/3/49.

The only part of interest here and the only part that is offered in evidence is the item reading "Paramount finds the part of 'Quentin' in 'Carriage Entrance' not important enough for John Lund."

That is all it is offered for in this case.

The Clerk: Is that received, your Honor?

The Court: Received as Plaintiff's 21.

(The document referred to was marked Plaintiff's Exhibit 21, and was received in evidence.)

Mr. Gang: I offer as Plaintiff's 22, also an "Important Communication" to Howard Hughes from Fred Schuessler, dated 8/2/49.

The Court: Received as Plaintiff's 22. [175]

(The document referred to was marked Plaintiff's Exhibit 22, and was received in evidence.)

(Testimony of Fred Schuessler.)

The Court: All communications to Mr. Hughes were important communications, were they?

The Witness: Very definitely, or he wouldn't open them.

Q. (By Mr. Gang): In that connection, will you please tell us how you would communicate with Mr. Hughes on these matters? Would you call him on the phone or would you write memos?

A. I would place a phone call for him first, then if I was unable to reach him within a reasonable period of time, I would send him a note. That is the reason for the "Important Communication," and he would undoubtedly call me.

Q. And you put "Important Communication" on top, so it would be called to his attention?

A. Very definitely.

Q. If that wasn't there he wouldn't see it?

A. He would in time, yes. He has an office on Romaine Street through which everything clears.

Q. Where is Romaine Street with reference to RKO Studios?

A. That is where the Hughes Tool Company and Hughes Aircraft and the personnel pertaining to various Hughes enterprises have their general offices. [176]

Q. And your instructions were to send communications to that office?

A. Everything clears through that particular office, and by marking it "Important Communication" that particular office knows that that is im-

(Testimony of Fred Schuessler.)

portant to get to Mr. Hughes and not to lie around on their desk.

Q. Had Mr. Hughes instructed you that these casting problems had to go to him for decision?

A. That is always understood.

Q. He was the final word on who was cast or not cast?

A. Generally.

Q. And in the particular instance we are talking about the answer is yes?

A. In this particular instance I would say so, yes.

Q. Plaintiff's Exhibit 17, the two typewritten sheets, which is headed "Cast—Carriage Entrance," shows under the name "Barbara" Ann Sheridan, under the name "Quentin" no name, and under the name "Paul" Melvyn Douglas, Vincent Price, Zachary Scott, Van Heflin, John Carroll, and Mel Ferrer. Do you remember and can you tell us how you came to draw up Plaintiff's Exhibit 17?

A. You are referring to the names now in that third character?

Q. I am referring to Plaintiff's Exhibit 17. You can look at it and refresh your recollection. [177]

A. This is just a general cast line-up that was sent to the various people interested in the production. Mr. Rogell, Mr. Sparks, Mr. Banks, perhaps Mr. Stevenson, and one or two of the men in my office.

Q. Now, the fact that there is no name opposite the character "Quentin" indicates that this occurred after Mr. Young had bowed out, does it not?

(Testimony of Fred Schuessler.)

A. It could be.

Q. Have you any independent recollection at this time? A. No, sir.

The Court: Let me see the exhibit.

(The document was handed to the court.)

Q. (By Mr. Gang): Can you explain why no names are put opposite the character "Quentin"?

A. I am sorry, I cannot.

Q. Can you remember now that Mr. Heflin and Mr. Mel Ferrer were being considered for the part which subsequently was played by Melvyn Douglas, not for the part of Quentin, is that right?

A. I am not sure that they were considered for the part of Douglas. To my knowledge they were only discussed for the part of Quentin.

Q. Can you explain why their names appear on that exhibit, which I believe is Plaintiff's 17, as suggestions for the part that Melvyn Douglas played? [178]

A. I didn't know they were on there. They are on that same list with the Melvyn Douglas character?

Q. Yes.

A. Then somebody suggested that they might be put on there, I presume.

Q. With reference to plaintiff's Exhibit 18, which is entitled "Important Communication" 8/4/49, that is August, from you to Mr. Hughes, I shall read it to you: "Checked again with MGM on Van Heflin for 'Carriage Entrance' and find that

(Testimony of Fred Schuessler.)

there is a slight chance of his being available after he finishes his present assignment in 'East Side West Side' around September 5. They will determine, after a series of production conferences next week, whether or not he will be available for an outside picture. Have arranged to call Grady one week from today, and should he hear anything before that time, promised to call us." Do you remember dictating that important communication?

A. Yes, sir.

Q. Did you ever hear from Mr. Hughes with reference to its contents, if you remember?

A. I don't.

Q. Plaintiff's Exhibit 19, which is dated 8/4/49 reads: "After a session with Bob Stevenson this morning, we learned that the character of 'Quentin' which everybody has turned down, is being changed into a more intriguing character, and [179] he asked if you would let him have Bob Ryan?"

The Court: Who is it addressed to?

Mr. Gang: To nobody.

The Witness: I can explain that. In writing to Mr. Hughes you will see on one of these other exhibits you have other items pertaining to perhaps two or three different subjects, and the other subjects pertain to other pictures, so when I received replies from him we cut—we separate the notes and file them with their respective pictures. The rest of that sheet is filed with some other picture, no doubt.

Q. (By Mr. Gang): You did, however, dictate this memorandum?

A. Yes, sir.

(Testimony of Fred Schuessler.)

Q. And the language is yours?

A. Yes, sir.

Q. And Bob Stevenson was the man who had been assigned to direct "Carriage Entrance"?

A. Yes, sir.

Q. And when you said "the character of 'Quentin,' which everybody has turned down," you were referring to the script which Mr. Young had declined?

A. Yes, sir.

Q. And do you remember now who the actors were who are included within your word 'everybody'?

A. John Lund—— [180]

Q. How about Wendell Corey?

A. No, because he was working in another picture for us at the time, so it wasn't submitted to him.

Q. Can you remember who everybody was besides John Lund?

A. No, I don't.

Q. You do remember at the time you dictated this, you as the casting director realized you had a problem in finding an actor who would play the role as it was then written?

A. I didn't consider it a problem. With the dearth of leading men we had in the business generally, we were pleased with the good fortune of having two good men under contract, so the character of Quentin never seriously doubted my ability to cast this thing properly.

Q. I didn't hear the last part.

(Testimony of Fred Schuessler.)

A. The character of Quentin never doubted my ability to cast this thing properly.

Q. So far as you can now tell us, August 4, 1949, which is the date of this memorandum, is the first time anybody ever asked you about Robert Ryan for the part of Quentin?

A. No, I am sure he was discussed prior to that, much prior to that, but the enthusiasm for Ryan, my enthusiasm for Ryan in the part seemingly wasn't shared by the rest of the people. [181]

Q. What is the procedure at RKO when the studio assigns an actor to play a role after the discussions have taken place, how do they do it?

A. They notify the actor that he is assigned to play——

Q. Does any written memorandum go down from, I might say, on high, to the departments?

A. No. It is all done by phone.

Q. In other words, if somebody is approved by Mr. Hughes he tells Mr. Rogell by phone?

A. That's correct.

Q. And then Mr. Rogell tells whatever departments are to be informed of that fact?

A. That's correct.

Q. But somebody does make the decision, is that right? A. Very definitely.

Q. And the decision is a decision stating that somebody has been assigned to portray a role?

A. Yes, sir.

Q. And in connection with "Carriage Entrance"

(Testimony of Fred Schuessler.)

the final decision as to who would play a role had to be made by Mr. Hughes?

A. Yes, in conjunction with Mr. Rogell.

Q. You say "in conjunction with"—you mean he would have to tell Mr. Rogell, is that [182] right?

A. Yes. But he had a lot of confidence in Mr. Rogell, and if he recommended someone, why, he usually listened to him, he took that into consideration.

Q. Plaintiff's Exhibit 20, Mr. Schuessler, had no date, but it is in your handwriting, I believe. It reads "Richard Conte, 'Carriage Entrance.' Send script when S. R. gets H. H. approval." Do you remember the document? A. Yes.

Q. And "S. R." means Sid Rogell?

A. Right.

Q. And "H. H." means Howard Hughes?

A. Right.

Q. And the notation was that you couldn't send the script to Fox until Mr. Rogell got Mr. Hughes' approval? A. That's correct.

Q. And you never got word that such approval had been granted? A. I did not.

Q. Plaintiff's Exhibit 21 is dated 8/3/49, and also is entitled "Important Communication to Howard Hughes from Fred Schuessler." I think I have read that part before, your Honor, and I won't read it again, about John Lund, except to ask you if you dictated that memorandum of Plaintiff's Exhibit 21? A. That's right. [183]

(Testimony of Fred Schuessler.)

Q. The last is Plaintiff's Exhibit 22, also entitled, "Important Communication to Howard Hughes from Fred Schuessler," dated 8/2/49, and it reads, "Kirk Douglas' finishing date will be three or four weeks away instead of two as represented by the agent. Furthermore, Warners' advises they undoubtedly will exercise their preemptive rights to his services for 'Glass Menagerie,' to start soon after his present assignment. Paramount are now reading 'Carriage Entrance' script for John Lund and will advise if they are interested. They unhesitatingly declared, however, that they would not be interested in 'Come Share My Love' for him. Any interest in Cornel Wilde or Richard Basehart for 'Carriage Entrance' "?

Do you remember dictating that memorandum?

A. Yes, sir.

Q. And sending it to Mr. Hughes?

A. Yes, sir.

Q. Do you have any recollection of the receipt of any word from Mr. Hughes with reference thereto?

A. No, sir.

Q. I will ask you, Mr. Schuessler, to look in your file for your copy of that budget detail and tell me how many weeks of shooting schedule there was for "Carriage Entrance" with Ann Sheridan?

A. You have it here as an exhibit.

Q. The copy of it in the file. If there isn't, we [184] will get the other one. I might as well show you Plaintiff's Exhibit 15. I think you have an exact copy.

(Testimony of Fred Schuessler.)

A. No. This one was dated September 6th. October 6th, rather.

Q. Hold that, too. Will you tell us from Plaintiff's Exhibit 15, I believe, what the projected shooting schedule for "Carriage Entrance" was in July of 1949? A. Five weeks.

Q. In other words, that is six days per week, 30 shooting days? A. Right.

Q. Will you explain to the court and the jury what you are talking about when you say shooting schedules?

A. A shooting schedule is made up by the production office showing the scenes that are to be shot each day. Anything more?

Q. When you say "five weeks," that means the experts in that department have estimated that the picture as contemplated can be photographed in that period of time? A. That's correct.

Q. So if you had October 18th, 1949, as the last day of the 15-week period of Miss Sheridan's employment contract, as you have testified, if you counted back five weeks from that day the picture could theoretically have started at any time up to that date and finished within the 15-week [185] period? A. Yes, sir.

Q. The picture "Carriage Entrance" was made by RKO, was it not? A. Yes, sir.

Q. And it started shooting sometime in the month of September, 1949?

A. I don't know the dates.

Q. It has been stipulated it began towards the

(Testimony of Fred Schuessler.)

end of September, and finished early in November of 1949.

I believe the exact date is September 26th, Mr. Knupp, if I am not mistaken.

Mr. Knupp: The date it was finished?

Mr. Gang: No, the day it started.

Mr. Knupp: It started on September 26th and finished on November 1st.

Mr. Gang: Yes. I will accept those dates. Are those the correct dates?

Mr. Knupp: That is as I recall the dates, Mr. Gang.

Mr. Gang: The stipulation is a little different. I think we had better stick to the stipulation. I think certain work began, rehearsals and tests, but the stipulation you gave me, which I have accepted, is that principal photography, which is what we are talking about here, began on October 3, 1949, and was completed November 16, 1949.

Q. (By Mr. Gang): In other words, with those dates, the [186] picture as actually photographed was within a five-week period?

A. That's right.

Q. Was your office consulted with reference to casting Mr. Mitchum in the role of Quentin?

A. No, sir.

Q. Who did that?

A. I couldn't answer that.

Q. Nobody told you? A. No, sir.

Q. Who cast Ava Gardner to play the role that Ann Sheridan had been employed for?

(Testimony of Fred Schuessler.)

A. I couldn't answer that.

Q. Nobody told you that? A. No, sir.

Mr. Gang: That is all, Mr. Schuessler.

The Court: Cross-examine.

Mr. Knupp: Mr. Schuessler is being examined as an adverse witness. We have no desire to cross-examine at this time. We understand that we reserve the right to call him and ask him any questions with respect to not only new matters, but also with respect to any matters which have been gone into on cross-examination.

The Court: That is correct. You may step down.

Mr. Gang: Mr. Youngman. [187]

GORDON E. YOUNGMAN

called as a witness by the plaintiff under Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Gordon E. Youngman.

The Court: This witness is also called under Rule 43(b) of the Rules of Civil Procedure?

Mr. Gang: Yes, your Honor, although there is a slight difference. Mr. Youngman is not now employed by the defendant. He was during all the time herein material.

The Court: The rule applies, though?

Mr. Gang: Yes.

(Testimony of Gordon E. Youngman.)

Direct Examination

By Mr. Gang:

Q. You are a resident of California, Mr. Youngman? A. Yes, sir.

Q. And during the period of time we are here concerned with from April 29, 1949, to August 17, 1949, and beyond, you were an employee of the defendant RKO? A. Yes, sir.

Q. You were a resident vice-president?

A. Yes.

Q. And your job was administration of contracts, more or less? [188]

A. That was part of it, yes.

Q. You are by profession a lawyer, are you not?

A. I am.

Q. And you are now again practicing in that profession? A. I am again practicing.

Q. From the time that the contract of April 29th was signed by RKO with Miss Sheridan, matters having to do with amendments of the contract or consents were within your jurisdiction?

A. Yes, they were handled by my department.

Q. I won't take up the time of the court to go through the exhibits which were signed by you in that capacity, but I would like to question you briefly with reference to certain items to clarify them.

The first document, Mr. Youngman, is Plaintiff's Exhibit 7 in June of 1949, and it refers to an agreement on the part of the studio and Miss Sheridan

(Testimony of Gordon E. Youngman.)

requested by you delaying the date on which you were to deliver the final budget up to July 25, 1949. Do you remember the occasion?

A. No, I don't.

Q. Well, the contract provided under Article 7 that you had to deliver a copy of the list of deferments and the final budget by a certain date.

A. Oh, yes, yes.

Q. And you requested that Miss Sheridan consent to [189] postponing that date?

A. That is correct. The reason I didn't remember at first is because I didn't prepare any of these instruments; I just signed them.

Q. The reason I asked you is because your signature is on it.

Plaintiff's Exhibit 8 is dated July 8, 1949, and again is a letter signed by you in which you requested and secured the consent of Miss Sheridan to casting Mr. Melvyn Douglas in "Carriage Entrance" and getting her agreement to giving him co-star billing in third position. Do you recall that under the contract you required her consent?

A. Yes, I remember that Ross Hastings, one of my assistants, had that discussion with Miss Sheridan's manager and brought the letter up for me to sign.

Q. Under date of July 25th, Plaintiff's Exhibit 10 is another agreement under Article 7 postponing the date on which you were required to deliver the list of deferments and the final budget to August 15, 1949. Do you remember that occasion?

(Testimony of Gordon E. Youngman.)

A. Yes, I do.

Q. Under date of August 13, Plaintiff's Exhibit 11 was the one in which you did supply the list of deferments and the budget? A. Yes. [190]

Q. I direct your attention to Tuesday, August 16, 1949. Your office at that time was on the same floor of the building, RKO Studios, as that which Mr. Sidney Rogell's office was? A. Yes, sir.

Q. Do you remember the afternoon of that day and a visit from Miss Sheridan accompany by Mr. Hickox? A. Yes, I do.

Q. There was no previous appointment for that meeting, was there, Mr. Youngman?

A. No, sir, they just dropped in and asked if they could see me.

Q. Do you remember the occasion as to how it occurred, who came in first, or did your secretary announce them?

A. My secretary called and said, "Miss Sheridan and Mr. Hickox would like to see you," and I said, "Ask them to come in."

Q. Up to that time you had never met Miss Sheridan? A. No, I never met her before.

Q. And Mr. Hickox introduced you to her?

A. That is right.

Q. Did you have a conversation at that time?

A. Yes, we did.

Q. Can you repeat the substance of what was said and by whom? [191]

A. Mr. Hickox did most of the talking, as I

(Testimony of Gordon E. Youngman.)

recall it. He sort of outlined the history of the deal——

Q. If you don't mind, and I hate to say this to another lawyer, would you rather say what he said, in substance, instead of giving your description of it?

A. All right. He said that she had made a contract with Mr. Banks and RKO had taken it over, as I knew, and she had had approvals under the contract of the leading man; that Robert Young had refused to approve it, and various submissions had been made to her. He mentioned Robert Ryan, Richard Basehart, Mel Ferrer, and Robert Preston, and that Miss Sheridan had not approved any of them. He said that it didn't look as if the picture were going to be made and he would like to know what the studio's position was regarding it. So I said that casting was not in my line, that I really had nothing to do with it, that I would have to look into the matter.

Q. Was anything said about the various people that Miss Sheridan had suggested that she did think would be suitable for the part?

A. Yes, Miss Sheridan said that she was willing to accept Franchot Tone, and she also said that Mr. Rogell was trying to see if Charles Boyer would be available.

Q. Was something said about John Lund?

A. John Lund, I don't believe he was mentioned. [192]

(Testimony of Gordon E. Youngman.)

Q. You wouldn't say that his name wasn't mentioned? A. No, I wouldn't.

Q. How about Richard Conte?

A. No, I am sure he wasn't mentioned.

Q. How about Robert Mitchum?

A. I don't recall his name being mentioned.

Q. Did Miss Sheridan or Mr. Hickox ask you to intercede with Mr. Hughes to get him to make a decision about an actor for that role?

A. I don't recall it being put that way. I think they asked me to find out for them what the studio's position was going to be, or what was going to happen. I don't recall being asked to intercede with Mr. Hughes.

Q. Isn't it fair to state that they came to see you to ask you to get some action?

A. That's right.

Q. And that is what they wanted you to do?

A. Yes.

Q. Even though casting wasn't your problem?

A. Yes.

Q. It is fair to state, isn't it, that Mr. Hickox and Miss Sheridan said that they had been trying to get together on a leading man for weeks?

A. No, I don't remember that being said. They told me the leading men that had been presented to them, and Miss [193] Sheridan said that she wanted someone with more of a name than these four, and she was willing to take Mr. Tone and would be willing to take Mr. Boyer if Mr. Rogell could arrange it.

(Testimony of Gordon E. Youngman.)

Q. Did you ask if she would take Mr. Boyer?

A. She told me.

Q. At that time did Miss Sheridan say she wanted to make the picture, on Tuesday, August 16th?

A. No, she didn't. As a matter of fact, Mr. Hickox said that it looked as if the picture were not going to be made.

Q. Did he say why?

A. Because they couldn't get the casting.

Q. And the purpose of the meeting with you, was it not, as they stated to you, was for you to intercede to get the part cast so that the picture could be made?

A. They didn't say that was the purpose.

Q. Didn't you infer that from the visit?

A. I didn't infer a great deal from the visit, Mr. Gang. It lasted about 10 minutes, and I said I would have to look into the facts. I had no previous knowledge of the arguments at all, and I was completely green on this subject. They had dropped in unexpectedly, I had no previous preparation for their visit, I wasn't familiar with the details of what had been going on before, and all I did was listen to [194] them and say that I would look into the matter and see what the situation was and what could be done.

Q. Isn't it a fact that they asked you to help?

A. Yes.

Q. That is why they came to see you?

A. That's right..

(Testimony of Gordon E. Youngman.)

Q. And after you had that visit with them did you talk to anybody? A. Yes, I did.

Q. You told whom that they had come to see you asking your help?

A. I first talked to Polan Banks, the producer of the picture.

Q. Did you talk to anybody with authority in the studio, like Mr. Hughes?

A. After I talked to various other people, yes.

Q. And after you talked to Mr. Hughes you consulted with your legal counsel? A. Yes.

Q. Both at the studio and outside the studio?

A. Well, Mr. Mendel Silberberg from outside the studio.

Q. And the resident lawyers at the studio?

A. Yes, Mr. Lipsitch, his partner, came in there.

Q. And in consulting with them you told them Miss Sheridan had come to see you Tuesday afternoon? [195] A. That's right.

Q. You related in detail the request that had been made to you at that time? A. Yes.

Q. And after relating that request and conversation to Mr. Silberberg and the legal department, what was done, Mr. Youngman?

A. After that particular conference—there had been a number of other conferences with other people in between——

Q. My question was what was done, Mr. Youngman.

A. A letter was sent. It was prepared by Mr. Lipsitch and sent to Miss Sheridan.

(Testimony of Gordon E. Youngman.)

Q. The document which I show you is dated August 17, 1949, signed by RKO by Gordon E. Youngman. I ask you if that is the document to which you have just referred? A. Yes, sir.

Q. That has been referred to as a letter of termination or discharge. You say that was prepared by Mr. Lipsitch of the studio legal department?

A. Of Mr. Silberberg's firm.

Q. And that was a result of several conferences or meetings, is that right? A. Yes, sir.

Q. Which began on Tuesday, the 16th of August, and continued until the late afternoon of Wednesday, the 17th of August? [196] A. Yes, sir.

Q. And there were several drafts, were there, before the document you have before you was sent out?

A. I don't recall. I think there may have been one previous draft. Mr. Lipsitch left the meeting, went downstairs for about 20 minutes or so, and came back with the letter which Mr. Silberberg, Mr. Rogell, and I, read. We may have changed a few words in it, I don't know.

Q. In any of these conferences did anybody suggest designating an actor to portray the leading male role, informing Miss Sheridan of the designation and asking her to approve or disapprove?

A. No.

Q. Did anybody suggest giving Miss Sheridan a chance to decide whether she wanted to make the picture with the person finally selected by you or not? A. Not in those conferences, no.

(Testimony of Gordon E. Youngman.)

Q. No discussion of that at all?

A. No, sir.

Mr. Gang: That is all, Mr. Youngman. Just a moment. Mr. Rudin calls my attention to something.

Q. (By Mr. Gang): You were vice-president all the time mentioned, didn't you so testify?

A. Yes, sir.

Mr. Gang: That's all. [197]

Mr. Knupp: With respect to this witness, if the court please, the same observation I made with respect to the prior witness is true. We desire not to cross-examine the witness, because he is called as an adverse witness. We expect to recall him as our own witness.

The Court: That is satisfactory. You may step down, Mr. Youngman.

Mr. Knupp: I suppose Mr. Youngman may be excused at this time?

The Court: He may be excused subject to your own arrangement with him, Mr. Knupp.

Mr. Gang: Your Honor, I am going to call next Mr. Polan Banks.

I would like to state that Mr. Hickox—I have not had him in the court room as his testimony would be purely corroborative. If Mr. Knupp wants him at any time, he is available.

Mr. Knupp: If the court please, we are not going to call Miss Sheridan's business manager to corroborate the testimony the plaintiff's witnesses have given on the stand. If Mr. Gang wants to put

Mr. Hickox on the stand, it is his duty to put him on, not to suggest to me that I put him on.

Mr. Gang: I don't want any discussion on it. I just made the statement.

The Court: Just a moment. The jury will disregard the [198] argument of counsel, it is not evidence in this case, and you will not base your decision on any argument, but upon the facts as you receive them in evidence, or the documents that are received, or the stipulations of the parties.

POLAN BANKS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Polan Banks.

Direct Examination

By Mr. Gang:

Q. State your residence, Mr. Banks.

A. Los Angeles, California; Beverly Hills, California.

Q. And your profession?

A. I am a writer-producer.

Q. And you have written several novels, have you not, Mr. Banks? A. Ten.

Q. And one of the ten was "Carriage Entrance"? A. Yes, sir.

Q. You proposed to make a picture based upon "Carriage Entrance"? A. Yes, sir.

(Testimony of Polan Banks.)

The Court: You have made it, haven't [199] you?

The Witness: Yes, sir. I stand corrected.

Q. (By Mr. Gang): It is in the record that you had a contract with RKO under which your corporation would produce the picture for distribution and release by RKO? A. Yes, sir.

Q. It is also in the record that litigation arose out of a claimed breach of contract on the part of RKO? A. Yes, sir.

Q. And that litigation was settled by your making a contract under which RKO acquired the property from you and took over your commitment with Ann Sheridan? A. Yes, sir.

Q. And in that transaction you were employed to act as what, Mr. Banks?

A. As producer of the picture, as sole producer of the picture.

Q. You were employed to act as what?

A. I was employed to act as sole producer of the picture with the addition of an executive producer put on the picture by the studio.

Q. Can you state what the functions of a producer are?

A. Well, to the best of my knowledge it is to pick the story, work on the script or with the writer on the script, help cast, and see it through production in general, through physical production. [200]

Q. At the time of the transaction in April of 1949, had you prior thereto discussed with Mr.

(Testimony of Polan Banks.)

Young or Mr. Goldstone, his agent, Mr. Young working as the leading male actor in the picture?

A. Yes.

Mr. Knupp: If the court please, that is objected to as incompetent and immaterial; conversations had by Mr. Banks at a time when he had no connection with the defendant in this action are hearsay and not binding upon the defendant in the action.

Mr. Gang: I will withdraw the question. It was preliminary, your Honor, but I will withdraw it.

The Court: Very well.

Q. (By Mr. Gang): At the time you made the deal with RKO did you tell them that Robert Young had agreed to play the leading male role in the picture? A. Yes, sir.

Q. And that was a fact at that time?

A. Yes, sir.

Q. And when the deal was made on April 29, 1949, that was one of the considerations which led to the making of the deal, is that right?

A. To the best of my knowledge.

Q. And that Miss Sheridan had approved Robert Young was also one of the conditions? [201]

A. Yes, sir.

Q. And she had approved one of three men to direct the picture also? A. Yes, sir.

Q. And also she had approved the story?

A. Yes, sir.

Q. And the settlement wasn't completed until all of those items had been agreed to?

(Testimony of Polan Banks.)

A. Do you mean the settlement with the studio?

Q. With RKO, yes. A. Yes.

Q. You stated that there was to be an executive producer. Will you tell the court and jury what that means?

A. I understand that it is general practice, as far as I know, it is general practice on all RKO pictures to have an executive producer on every major picture. I believe some of the other studios have the same practice and some do not.

Q. What does he do?

A. Well, he supervises the producer in general policy, and really acts as liaison with the front office. In other words, as far as the producer is concerned, as far as I am concerned, he represents the studio.

Q. In other words, he was in the chain of command between you and Mr. Rogell and Mr. Hughes?

A. Exactly. [202]

Q. What happened after April 29, 1949, with reference to the screen play which is described in the contract?

A. Well, the studio didn't like the screen play that they had purchased and they put on another writer to make changes, to make a complete rewrite, in fact.

Q. The name of that writer was Marion Parsonnet?

A. Yes.

Q. He was a man, was he not?

A. Yes, a very fine write, incidentally.

(Testimony of Polan Banks.)

Mr. Knupp: I didn't get the last part of the answer.

(The answer was read by the reporter.)

Q. (By Mr. Gang): And did you participate with him in discussions of his revision as it went along? A. Yes, I did.

Q. Where did those discussions take place?

A. In my office and at his home at Malibu Beach, and occasionally in Mr. Sparks' office.

Q. At RKO? A. At RKO.

Q. What is the first occasion that you remember on which Miss Sheridan came to RKO after April 29, 1949?

A. The first occasion, I believe was when she paid—was invited to come to the studio, and Mr. Rogell arranged a luncheon for her, which was attended by Mr. Rogell, Mr. Sparks, I believe, Mr. Stevenson, Mr. Lieber, and Mr. Hickox [203] and myself.

The Court: Were you here when Miss Sheridan testified?

The Witness: Yesterday morning, sir? No, sir. I came at 2:00 o'clock.

The Court: I was going to ask if this was the red carpet luncheon.

The Witness: Yes, it was. There were flowers on the table and all that sort of thing.

Q. (By Mr. Gang): You did mention lunch, I think, didn't you? This is a good time.

The Court: Yes, it is a timely topic.

Mr. Knupp: That was in addition to the flowers, I suppose.

The Court: Ladies and gentlemen of the jury, we will take our adjournment until 2:00 o'clock. Remember the admonition of the court not to converse or otherwise communicate among yourselves or with anyone about any subject touching the merits of this cause on trial. Do not form or express any opinion on the case until it is finally submitted to you for your verdict. The jury may retire.

(Whereupon at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [204]

Wednesday, January 31, 1951—2:00 P.M.

(The following proceedings were had in the absence of the jury:)

Mr. Gang: May it please the court, Mr. Rudin would like to present a motion at this time on behalf of plaintiff.

The Court: Is it stipulated the jury is absent?

Mr. Gang: So stipulated.

Mr. Knupp: Yes, your Honor.

Mr. Rudin: Your Honor, at the pretrial conference we discussed the question of our attempts to serve Mr. Howard Hughes, the managing director of production of the defendant. I was wondering if Mr. Knupp would stipulate that a subpoena was placed in the hands of the United States Marshal with instructions to serve Mr. Hughes on

or about January 9th of this month, and that the marshal made reasonable efforts to serve Mr. Hughes, but was unable to do so, including calling Mr. Ross Hastings of defendant, an officer of defendant or employee of the defendant, to arrange for service on Mr. Hughes; that although the marshal was informed that an attempt would be made to arrange for an appointment to serve Mr. Hughes, no such appointment was ever made and the marshal was unable to effect service on Mr. Hughes.

The Court: Pardon me just a minute.

(Slight delay in proceedings.) [205]

The Court: Go ahead.

Mr. Rudin: In addition, the plaintiff employed a firm which specializes in making difficult services, who sent out many employees in an attempt to find Mr. Hughes, who watched his apartment, went to the Goldwyn lot, went to other places where Mr. Hughes purportedly maintains offices, and was unable to serve Mr. Hughes; talked to people purportedly employed by Mr. Hughes who said that he should call the office to make an appointment to see Mr. Hughes, and upon calling Mr. Hughes' office was informed that Mr. Hughes was out of town.

We can present evidence on this if Mr. Knupp desires. He indicated perhaps he would stipulate that the plaintiff made every reasonable effort to serve Mr. Hughes but was unable to do so, and that Mr. Hughes is within the jurisdiction of the court.

Would you so stipulate to that effect, Mr. Knupp?

Mr. Knupp: If the court please, in the first place I think the evidence is entirely incompetent and immaterial for any purpose in this case, and upon that ground if evidence to the effect indicated by Mr. Rudin were offered we would object to it.

So far as the actual proof of any facts which he has related is concerned, I would agree that either Mr. Gang or Mr. Rudin would testify as to the attempts which they had made or which they had caused to be made to secure service. [206] I wouldn't consider it necessary that they should produce either themselves or any of the officers whom they say they secured to attempt the service.

I respectfully submit that the testimony is in no respect material or competent in this case. I would think, if the court please, the question of whether or not Mr. Hughes appeared in the case is something—that the effect of it is something which the court could determine as a matter of law.

Mr. Rudin: We asked Mr. Knupp to stipulate to that for several reasons. We would like the record to be clear that Mr. Knupp has been given an opportunity to produce Mr. Hughes, because we intend to ask the judge to instruct the jury that there is a presumption from Mr. Hughes' failure to appear and testify, that the presumption is that if he did appear and testify that his testimony would be adverse to the defendant on any of the issues in the case, and that counsel for plaintiff in closing argument to the jury can comment on the absence of Mr. Hughes and the failure of Mr. Hughes to come forth and testify at the trial.

We refer your Honor to two Supreme Court cases, *Mammoth Oil v. U. S.*, 275 U. S. 13, and to *Kirby v. Tallmadge*, 160 U. S., 379.

There is a California case on the matter, *Buswell v. City and County of San Francisco*, 89 Cal. App. 2d, 123. [207]

There are numerous federal cases and Circuit Court of Appeals decisions on this presumption. Would your Honor like some more authority on that proposition, that an inference does arise from the failure to produce a witness or testimony, that it can be commented upon by counsel, and an instruction can be given to the jury as to the presumption that the testimony or the evidence would be adverse to the party failing to produce that testimony or that witness?

We would also like to make a motion that the court issue——

The Court: What is your first motion? Have you made a motion so far?

Mr. Rudin: Our motion would be this, that the court issue its order requiring Mr. Hughes to appear and testify.

We make that motion based upon Rule 43(b) of the Federal Rules of Civil Procedure, which provides that a party may interrogate any unwilling or hostile witness by leading questions. It goes on with the general adverse witness rule. And upon the further ground that Mr. Hughes is an officer of the defendant, that the defendant is here in court, that the court has inherent power in con-

nection with a party before it to order that party to appear and testify.

We make the further motion—not so much a motion, but it is both a motion and request—that the defendant produce Mr. Hughes, and the court so instruct the defendant, to preserve our right and clarify our right at the conclusion of [208] the case to comment upon Mr. Hughes' absence and to request an instruction from the court to the jury as to the presumption that arises from Mr. Hughes' failure to appear as a witness.

The Court: Just a moment now.

Mr. Knupp: So far as the motion itself——

The Court: Just a moment, if you please.

Mr. Knupp: I thought you asked for my comment.

The Court: Not yet, Mr. Knupp. I was just checking the civil rules to see if there was anything directly in point in the matter.

Proceed now, Mr. Knupp.

Mr. Knupp: So far as the defendant is concerned, if the court please, there never has been any indication on our part that we doubted the right of the plaintiff to comment in this case on the failure of any witness to appear who does not appear. I have never understood that there was any question. I would assume that if it was apparently within the power of a party to produce a witness, and he did not produce the witness, that that fact is a matter of legitimate comment or argument to the jury. But that, I think, is as far as the matter goes.

There is no proceeding that I know of by which the presence of a witness can be compelled, except by subpoena, and if the parties have made an effort to secure the presence [209] of the witness by subpoena and have been unable to do so, and particularly in a case in which the witness is an officer of the corporation, then, as I say, I have no doubt that that is a matter of legitimate argument to the jury. But that, it seems to me, is as far as the matter goes.

So far as an instruction by the court is concerned, I suppose with respect to matters with which the witness might be shown by other evidence in the case to be familiar, and with respect to which there was a dispute between the parties as to what the facts were, the court might legitimately instruct that in those respects there would be a presumption that the evidence if produced would be adverse. But that, it seems to me, is the limit to which the law permits the court to go or which should be permitted.

Mr. Rudin: Your Honor, on that point I would like to reply briefly by pointing out that there is a Ninth Circuit case, *Collins v. Wayland*, 139 Fed. 2d, 677. The *Collins* case involved a failure to appear for a deposition without a subpoena, and the court struck the pleadings of the parties.

There seems to be some rather direct authority for that in Rule 39. I don't want to give the court the impression——

The Court: 37, I think you mean.

Mr. Rudin: 37, yes. Whether the same authority

exists in the court inherently as to appearance at a trial, it would seem to follow, although we submit there is nothing specifically [210] in the FRCP, as your Honor has just checked. However, although the court—in view of the fact that Mr. Hughes is not an actual defendant, but merely an officer, although the court might not have the power to punish Mr. Hughes for contempt, it can take action within the proceedings, such as striking pleadings, or the defenses or counter-claim, whatever it might in its discretion feel was a proper imposition of a penalty upon a party within the jurisdiction of the court who refuses to obey the order of the court to appear. As I say, there is no other direct authority that I have been able to find on the question of appearing in court.

As to Mr. Knupp's statement that anyone can comment on the failure of a witness to testify, as I read the cases the rule seems to be that comment can only be made if the witness was unavailable to the party making the comment and available to the other party.

The Court: He has conceded that point. I take it from now on that as far as that is concerned if Mr. Hughes isn't produced he has conceded that you may comment to the jury, and that his testimony would probably be adverse if he hasn't been produced.

Mr. Rudin: We wanted to make the point that he wasn't available to us.

The Court: This was raised at pretrial and no

one has presented any law on it, and I asked counsel to present some [211] law on it. You presented me some cases by way of citation, but I have no memorandum on it, and I don't intend to take up the time of the jury conducting a research at this time. Let me see where we are on the matter.

You have made a motion that the court make its order directing the defendant to produce Mr. Hughes.

Mr. Rudin: That is correct.

The Court: That is one motion.

What penalty do you think lies if the court makes that order and Mr. Hughes is not produced?

Mr. Rudin: I think the court might have the power to strike the defendant's pleadings from the action.

The Court: What was your second motion now?

Mr. Rudin: Our second motion was mainly a motion for the court to make the order to the defendant to produce Mr. Hughes, to clarify our position.

The Court: That is your first motion.

Mr. Rudin: The second motion was in connection with the right to make a demand. It was sort of a notice to produce, conditioned upon the fact that if they failed to produce him we would then expect to have the right to comment upon that failure.

The Court: I thought you said something about instruction of the court.

Mr. Rudin: We would then request a proper instruction [212] from the court, jury instruction.

The Court: As I see it, there is really one mo-

tion, and sort of a request or notice to the defendant to produce Mr. Hughes, or else; that you are going to comment to the jury and that you are going to ask the court for an instruction.

In looking over these Rules of Civil Procedure you are impressed by the breadth of these rules, except that they do not mention this particular situation. The discovery proceedings in Federal Courts are very broad, the parties can be required to produce documents, permit premises under their control to be inspected, to make admissions of fact, to answer written interrogatories, to give depositions, to submit to physical and mental examinations; and there is ample teeth in Rule 37 to compel compliance with these orders. It provides, first, that the party can be held in contempt. There are various provisions here. One of them is 37(b)(2)(iii):

“An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed,”

Of course, as far as the defendant is concerned he may not be concerned how long the proceeding is stayed.

“or dismissing the action,”

Well, that is no penalty against the defendant.

“or proceeding or any part thereof, or rendering [213] a judgment by default against the disobedient party;”

Then (iv):

“In lieu of any of the foregoing orders or in addition thereto, an order directing the ar-

rest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.”

Offhand it is hard for me to believe that Congress—that the Supreme Court would have proposed and Congress approved these rules without having in mind that the court should have power to compel a party to a proceeding to comply with the orders of the court. For instance, notice is given of a deposition, if a party doesn’t appear penalties can be applied; or if a party refuses to answer written interrogatories there are penalties to be applied. Although it is not spelled out, it seems to me that the rules are sufficiently broad to indicate the power of the courts to control the litigants that appear before them.

That is a very offhand opinion. It does mean reading between the lines on the rules. But when you read the rules and their purpose, it is to make it possible for the court to conduct full discovery proceedings before trial, and as an adjunct to the trial, part of the pretrial and a pretrial is really part of the trial itself. [214]

I am not going to take any further time on it this afternoon. I will put the matter down for hearing tomorrow morning at 9:30 before the jury comes down, and we will consider the matter further. I think we ought to clear a little brush away here.

No. 1, is it stipulated that Mr. Hughes is within the jurisdiction of this court at the present time?

Mr. Knupp: No, if the court please. I discussed

this matter with your Honor and counsel in chambers and indicated something of what I thought Mr. Hughes might be doing at the present time, and my present information is that he is not in the State at the present time.

The Court: You didn't tell me that the day before yesterday.

Mr. Knupp: I didn't know it, if the court please, because when we came in on the matter I had no such information, and I am not sure of it now, if the court please, but that is my last information.

The Court: Is there any way for you to ascertain through your client where Mr. Hughes is at the present time?

Mr. Knupp: I think I can ascertain this evening, if the court please, where he is.

The Court: I would like a statement tomorrow morning from you, as an officer, of this court, as to where Mr. Hughes is, to the best of your information. [215]

Mr. Knupp: Yes, if the court please, I will have that information.

The Court: Secondly, it seems to me—I don't know that the record is clear as to what stipulation was made, if any, as to the activities of the marshal and the private agency that tried to serve Mr. Hughes. If there is a stipulation as to those activities as stated by Mr. Rudin, then the record will be clear. If there is not, then I think that an affidavit should be produced by the marshal as to what he did, and by the agency as to what they did in trying to serve a subpoena on Mr. Hughes.

Mr. Knupp: I have no personal knowledge of that, as your Honor must realize. I assume that Mr. Rudin has stated the facts correctly. I wouldn't question his statement. I have never questioned a statement of counsel on the other side about things of that character.

The Court: I thing the record would be in better shape if an affidavit was presented by both the marshal and the agency as to the date on which they undertook an attempt to serve Mr. Hughes and what they did. It isn't too big a job to ask you to do it this evening.

Mr. Gang: May I be heard, your Honor?

May I ask your Honor to request Mr. Knupp in his statement, also, to ascertain what the whereabouts of Mr. Hughes has been since January 9th when we tried to serve him. We [216] would like the record to show that he was in the jurisdiction during most of the time that we were attempting to serve him.

The Court: Within general limits. I don't expect Mr. Knupp to tell us where he was every day, but if he can ascertain where he has been since January 9th, I think that would be helpful.

I think, also, if he is presently out of the jurisdiction there should be an attempt to ascertain when he intends to return to the jurisdiction.

I am not passing on any of these matters. I am going to read these cases, and I will hear from you tomorrow.

Finally, I suppose I could take judicial notice that Mr. Hughes is a busy man. On the other hand,

he is an executive of this defendant corporation, and as far as this court is concerned he is no privileged character. He is no more important than Mr. Youngman or Miss Sheridan or Mr. Gang or Mr. Knupp, and if the law is that certain things follow if he isn't produced, they will follow whether he is Mr. Hughes or whether he is the janitor of this building. So we will go into it further tomorrow morning.

I realize that he is a busy man, I realize that some of his activities concern the defense of this country, but at the pretrial conference or one of the conferences we discussed the fact that he could be presented within certain days of the trial out of order, and a statement was made that [217] probably 30 minutes of his time would be required, and although I don't know what the full calendar of Mr. Hughes is every day, I would hazard that there are 30 minutes during the day that his time is spent in activities that are not quite as profitable as testifying before the Federal Court. I don't think we should use the word "profitable," but say as important as testifying before the Federal Court.

In any event, in view of the request counsel have made for the production of Mr. Hughes, in the event he is not produced, and in view of Mr. Knupp's stipulation, I think I will permit counsel for the plaintiffs to argue to the jury that had he been produced his testimony would have been adverse generally to the position of the defendant.

I will also consider tomorrow morning the ques-

tion as to whether or not the court should give an instruction to the jury to the same effect.

Do any of these cases you have cited deal with the matter of instructions?

Mr. Rudin: Yes, the California case dealt directly with that.

The Court: Mr. Knupp has indicated in his argument that as to any instruction it would have to be limited to certain particularities. I haven't read these cases in a long time, but my general recollection is that it is a general instruction that had he been produced his testimony would have been [218] adverse to the position of the litigant.

Mr. Knupp: It seems to me, if the court please, that it could only be adverse with respect to those matters which testimony of other witnesses indicated that he had some information.

The Court: Well, you can argue that, but it seems to me that we can't tell what his testimony would be until he gets here. All we can say is that it would probably be adverse or he would have been brought in as a witness.

Mr. Knupp: Except it seems to me that unless there is some general limitation—Mr. Hughes was a party only to certain conversations, apparently, in connection with this case, and I don't know how he could be adverse to the defendant in any respect other than those conversations to which he may have been a party or those negotiations.

The Court: Well, the record so far only shows those conversations, but how do we know, if he was

introduced here as a witness, that it might not develop that he had other conversations?

Mr. Knupp: If he had any other conversations with the plaintiff or any of her agents, I assume those conversations would have been testified to here by the plaintiff or her witnesses.

The Court: Let's suppose he had a conversation with Mr. Rogell, that wouldn't be privileged, would it? [219]

Mr. Knupp: Mr. Rogell will be produced, if the court please.

The Court: Yes, but a litigant isn't bound to limit himself to the interrogation of one agent of a defendant. No conversation between Hughes and Rogell would be privileged, would it?

Mr. Knupp: Not with respect to this matter.

The Court: Suppose Mr. Hughes had unburdened himself and had told Mr. Rogell just why he wasn't going to come to terms with Miss Sheridan on the matter of a leading man? Let's speculate. It might be a very material conversation. Mr. Rogell might honestly take the stand and not recall it, but Mr. Hughes might under proper cross-examination.

We will talk about it more tomorrow morning.

Mr. Knupp: Can Mr. Gang and I talk to your Honor?

The Court: Yes.

(The following proceedings were had at the bench:)

Mr. Knupp: I think I should have 10 minutes,

and I will try to see if I can find out where Mr. Hughes is. I ought to do it now, because tonight might be too late.

The Court: That is all right. We have the time.

Mr. Knupp: Fine. Thank you very much, your Honor.

(The proceedings were resumed in open court as follows:)

The Court: We will take a short adjournment and counsel will advise me when you are [220] ready.

(A recess was taken.)

(Whereupon the proceedings were resumed within the presence of the jury, as follows:)

The Court: Stipulate that the jury are present and in their proper places?

Mr. Knupp: So stipulated.

Mr. Gang: So stipulated. Mr. Banks, will you resume the stand, please?

POLAN BANKS

called as a witness by the plaintiff, having been previously sworn, was examined and testified further as follows:

Direct Examination

(Resumed)

By Mr. Gang:

Q. I think we recessed just after you were asked about the red carpet lunch. That took place,

(Testimony of Polan Banks.)

I understand, sometime towards the end of June of 1949?

A. I believe it was.

Q. Mr. Banks, you have a soft voice.

A. I am sorry, I have a cold.

Q. Would you lift it just a trifle?

A. I will try. I believe it was, sir.

Q. At your next meeting with Miss Sheridan, Mr. Sparks, and others, after the 4th of July—

A. I don't remember the actual date. [221]

Q. Is there any fact which might fix the date in your mind? By that I mean was your next meeting before or after you received word that Mr. Young would not play the part of Dr. Quentin?

A. That I am not sure of, sir, because we were still working on the script, I believe, at that time.

Q. If I state to you that it has been testified here and that documentary evidence has been introduced here that the information with reference to Mr. Young came to the attention of plaintiff and the defendant sometime after the 4th of July, would that help you fix the date?

A. Yes, it is very probably true.

Q. And can you tell us, then, how you heard that Mr. Young was not to play the part of Dr. Quentin?

A. I was informed first by Mr. Nat Goldstone, my agent, with whom I was in contact about it, it happens Mr. Goldstone also represented Mr. Young, and I don't remember whether I informed Mr. Sparks then or whether Mr. Sparks already knew it from the front office.

(Testimony of Polan Banks.)

Q. Was this statement made to you by Mr. Young's agent after he had received the script as it was at that stage early in July?

A. Yes, I believe it was.

Q. You state that you did discuss the matter with Mr. Sparks? [222]

A. I am almost certain I did.

Q. Did you discuss it with Mr. Rogell?

A. I do not believe so. I am not certain.

Q. In your relationship with RKO you took matters up with Mr. Sparks who was your immediate superior? A. Almost entirely.

Q. And he took it up with Mr. Rogell?

A. Yes.

Q. Can you tell us what then happened after this act had taken place?

A. Do you mean the act, sir, of Robert Young turning down the script?

Q. Robert Young turning down the part, yes.

A. Well, we then all set about trying to find another leading man, and we had a number of meetings in which we discussed various possibilities.

Q. Can you first tell us over what period of time the meetings took place?

A. To the best of my recollection I think it was over a period of a couple of weeks.

Q. Running from the first third of July to the end?

A. Roughly from the fourth of July to the end of the month, or the 21st, something like that.

Q. Were they conferences?

(Testimony of Polan Banks.)

A. Well, they were informal talks on the part of Mr. [223] Sparks and myself, and then there were conferences together with Miss Sheridan and her agent—and Mr. Hickox.

Q. Can you tell us as best you can what took place at the first of those meetings?

A. The first of those meetings, as I remember it, it is quite a while back, I think we went through the casting book Mr. Sparks brought out, and we discussed informally a number of people, the various reasons the names that came up either weren't available or weren't considered available at the time.

Q. Was there any discussion at this meeting as to the reason for Mr. Young's refusal to play the part?

A. Yes, the discussion, as I remember it, was over the fact that—the way the script had been rewritten, had been changed, how Mr. Young had declared the part according to the new script no longer measured up to what he expected from it before, and I remember some of the discussion was about finding another leading man that might not have the same objection.

Q. Did Mr. Sparks participate in that discussion? A. Yes, of course.

Q. Did he express any opinion with reference to the statements that had been made about the part being small now?

A. I don't remember specifically. It was general conversation. [224]

(Testimony of Polan Banks.)

Q. Is it fair to say that the concensus of all present was that there would be difficulty in finding a replacement for Mr. Young because of the way the script had been rewritten?

A. I wouldn't say exactly.

Q. Tell me what it was to the best of your ability.

A. I don't remember exactly the gist of the conversations except that we all knew that there was a limited number of leading men available, we believed since we had the script finished that the part called for a leading man—we didn't all perhaps agree—I didn't agree myself that Bob Young shouldn't have liked the part as it was——

Mr. Knupp: Mr. Banks, I am sorry, I can't hear you. It is awfully difficult from that distance to me to hear, and I can't hear you.

The Court: Where was I?

(The answer thus far given was read by the reporter.)

The Witness: As a matter of fact, I wanted at the time to see Mr. Young and talk to him and try to talk him into reconsidering, or into letting us rewrite it according to how he might suggest. I talked to my agent Goldstone about it, and he said he tried to reach Young and he reported to me that Young was out of town, that he reached him by telephone and he said he definitely didn't want the part as it then was.

The Court: Does the record show whether this

(Testimony of Polan Banks.)

witness was [225] an employee of the defendant at the time?

Mr. Gang: Yes, it shows he was employed to act as sole producer of the picture.

The Court: Is this witness called under 43(b) also?

Mr. Gang: No, he is not. He is called as our witness.

The Court: All right.

Mr. Gang: He is also subpoenaed by the defendant, if the court please, but I have called him as our witness.

The Court: All right.

Q. (By Mr. Gang): Was there any discussion with Mr. Sparks at that time with reference to RKO taking steps to force Mr. Young to play this part? A. That, frankly, I don't remember.

Q. Was there any such discussion between you and the officials of RKO?

A. To force Mr. Young——

Q. Taking steps under their contract, if they had any, to require Mr. Young to perform?

A. Not to my recollection.

Q. Was anything said about anybody from RKO attempting to persuade Mr. Young to reconsider other than you?

A. No; the only thing I remember in that connection was that I believe, if I remember rightly, Mr. Sparks asked Miss Sheridan if she would like to talk to him. I may be wrong. Miss Sheridan may have suggested it herself. I know [226] the

(Testimony of Polan Banks.)

suggestion came up, in which Miss Sheridan was willing to try to contact Mr. Young to talk to him, and I contacted, again, Mr. Goldstone, and he said that it would be practically impossible to talk Young into doing it.

The Court: Keep your voice up. The jurors are having difficulty, and I know counsel are. Speak as loudly as you can, Mr. Banks.

The Witness: I will do that, sir.

Q. (By Mr. Gang): Does anyone have a cough drop?

A. I am sorry. I have been taking this medicine. I will try to talk as loudly as I can.

Q. Do you remember in these conversations, and if you cannot separate them, I can't expect you to do better than try, I will try to segregate them as I understand they took place, and you correct me if they do not agree with your recollection—do you remember a discussion in which the name of Mr. John Lund was mentioned?

A. Yes, I do remember that Mr. Lund was mentioned.

Q. Can you state what was said and by whom?

A. Well, I know his name came up when we were discussing the possibilities for leading men, I believe Mr. Sparks said that he would make inquiries to see if Mr. Lund was available.

Q. Did Miss Sheridan say anything about Mr. Lund?

A. At that time I don't believe—to the best of

(Testimony of Polan Banks.)

my [227] recollection at that time I don't believe she passed judgment on him.

Q. Subsequently did she, if you remember?

A. To be very honest, I don't remember completely.

Q. Was any suggestion made with reference to Mr. Richard Conte?

A. Yes, there was a reference made to Mr. Conte.

Q. Do you know who made it?

A. I am not sure who brought the name up.

Q. Do you remember what Miss Sheridan said about Mr. Conte?

A. To the best of my recollection Miss Sheridan didn't approve of Mr. Conte for the role.

Q. That is your best recollection?

A. Yes.

Q. Did you ever hear about a script being asked for by Fox with reference to Mr. Conte?

A. Being asked for by Fox?

Q. Yes. A. No, I do not.

Q. Was the name Richard Basehart mentioned?

A. Yes, and I remember it being put to Miss Sheridan and she said she thought he was too young for that particular role.

Q. What did you say about it? [228]

A. I agreed with her, as it happened.

Q. Was any discussion had with reference to the possibility of Wendell Corey playing the role?

A. Yes; as a matter of fact, Miss Sheridan and Mr. Hickox and myself, and I think—I am

(Testimony of Polan Banks.)

not sure—I think Mr. Sparks was with us, he may not have been, walked over to Paramount Studios next door to look at some film on Mr. Corey, and Miss Sheridan didn't see him for the role either.

Q. Did you express any opinion?

Mr. Knupp: I didn't get the last answer, Mr. Reporter.

The Witness: Miss Sheridan—I believe I said Miss Sheridan didn't see him for the role. I believe that was the phrase I used.

The Court: Can't you speak louder, sir?

The Witness: I will try, sir.

The Court: Do you have to direct pictures?

The Witness: No, sir, I don't.

Mr. Gang: He writes them, your Honor.

The Witness (Continuing): I agreed on that particular occasion, I agreed that I didn't see Mr. Corey for the role, either.

Q. (By Mr. Gang): Do you remember an occasion upon which the name Franchot Tone was used? A. Yes, I do.

Q. Where did the conversation take [229] place? A. In Mr. Sparks' office.

Q. Who was present?

A. To the best of my recollection Mr. Sparks, Miss Sheridan, Mr. Hickox, and myself; I don't remember whether there was a fifth party or not.

Q. Who mentioned Mr. Tone's name?

A. To the best of my recollection Mr. Sparks first mentioned his name.

(Testimony of Polan Banks.)

Q. Can you remember now that his name was mentioned?

A. Yes, we had been canvassing practically everybody we could think of in a general discussion, it came towards the end of the discussion, and, as I remember it, Mr. Sparks threw into the hopper the suggestion, he said, "What do you think about Franchot Tone?" And Miss Sheridan hesitated, as I remember it, and said something to the effect that—these aren't the exact words, because I don't remember them—something to the effect that that might not be a bad idea, and Mr. Sparks, as I remember it, said, "I think he is on the lot now; would you like to have a look at him?" And then he sent for Mr. Tone or called and arranged for Mr. Tone to come in. There was some general conversation, particularly between Miss Sheridan and Mr. Tone, both of whom had just recently returned from Europe, and afterward Mr. Tone left the office and Miss Sheridan said she thought that he might be very good for the role. [230]

Q. What did Mr. Sparks say?

A. Mr. Sparks said in that case he would have to take it up with the front office.

Q. What did you say?

A. I don't remember that I made any particular comment on it.

Q. Were you in agreement that he would be suitable for the role?

A. I don't frankly remember.

Q. You did not object, however?

(Testimony of Polan Banks.)

A. Not at the time, no.

Q. Did you subsequently hear of what happened with reference to Mr. Tone?

A. Yes, I heard that the New York office, when the proposition of having Mr. Tone was brought to them, turned it down for the reason that they said that a cast with Mr. Tone and Melvyn Douglas would, in conjunction with Miss Sheridan, look too much like a reissue, particularly because of the two men in the picture, so they were against the project. For that reason, basically, I think Mr. Tone was turned down.

Q. Do you remember any discussion with Mr. Stevenson, the director, and Mr. Parsonnet about the suitability of Mr. Tone for the role?

A. Not specifically. [231]

Q. Just generally do you remember talking about it?

A. I know I talked to both Parsonnet and Mr. Stevenson at various times, but I don't remember exactly what that conversation was about.

Q. Meetings at which you discussed the difficulty of casting that part, did you discuss with the writer and the director the building up of that part?

A. Yes, I did.

Q. Was that done? A. Yes, it was.

Q. Can you remember when in the discussions the name of Robert Mitchum came up?

A. To the best of my recollection Mitchum's name came up almost near the end, the very end of this whole affair. I believe Miss Sheridan asked

(Testimony of Polan Banks.)

me one day when we were leaving—when the group of us were leaving the studio dining room, what did I think of Bob Mitchum, and I thought he would be wonderful if we could get him, and she said, “I would like very much to have him if we could get him,” to speak to the front office. I spoke to Mr. Rogell the next time I saw him, and he said he thought it would be impossible because Mr. Mitchum was in another picture and scheduled for another one to follow that. I so reported to Mr. Hickox, who I believe told Miss Sheridan.

Q. Were you informed of the meeting that took place [232] Monday, August 15th, between Miss Sheridan and Mr. Hughes?

A. Yes, I learned about it.

Q. Later? A. Yes.

Q. You were not present?

A. No, I was not present.

Q. Did you meet Miss Sheridan on Tuesday, the 16th of August? A. Yes, I did.

Q. Did she tell you she had seen Mr. Hughes the night before? A. Yes, I believe she did.

Q. Did she tell you what the conversation was about in general?

A. Yes, I think so. As I remember it, she told me that she and Mr. Hickox both, that they had discussed the various people that we had in mind already and that Mr. Hughes wanted her to particularly consider again Mel Ferrer and Robert Ryan, and that the upshot of the conversation was that Mr. Hughes suggested or requested Ann to look

(Testimony of Polan Banks.)

at some more footage on these two people the next day, and she agreed to do it and she came to the studio the next day to see it.

Q. You sat in the projection room with Miss Sheridan and watched the film?

A. Yes, I did. [233]

Q. Was there any discussion on that occasion with reference to Charles Boyer?

A. I don't remember whether it was on that particular occasion, but I know we had discussed Boyer during that week sometime.

Q. Were you consulted with reference to the termination of Miss Sheridan's contract?

A. No.

Q. When did you first learn of it?

A. I learned of it I think the day that everybody else did, when it appeared in the papers.

Q. That would be Friday, the 19th of August?

A. Yes.

Q. Did you talk to Mr. Sparks about it?

A. Yes.

Q. Had he been informed of the act?

A. I believe it came as much a surprise to him as it did to me.

Q. Were you consulted with reference to casting Robert Mitchum in the Dr. Quentin role?

A. No, I was not.

Q. Were you informed of that after it had been done? A. Yes.

Q. Is the same true of Ava Gardner?

A. Yes. [234]

(Testimony of Polan Banks.)

Q. Did you continue with your work on the production between the 16th of August and early in September when Mr. Mitchum and Miss Gardner were assigned to the picture? A. Yes, we did.

Q. The activities on the picture were not discontinued at any time?

A. Well, I was at work at that time, if my memory serves me, still with Mr. Parsonnet on polishing up the script.

Q. In other words, nobody from RKO told you to stop what you were doing? A. No.

Q. And you continued on just as you had in the past? A. Yes.

Q. And you stayed on with the picture after Mr. Mitchum and Miss Gardner were assigned to it? A. Yes.

Q. The script was revised again, was it not?

A. Yes, it was.

Q. This was to meet Mr. Mitchum's requirements? A. Yes.

Q. The picture went into rehearsal late in September, 1949, did it not? A. Yes.

Q. Photography was completed about the middle of [235] November, 1949?

A. Roughly about that time.

Q. And the script as it was made was substantially the story which you had written to be made when the contract of April 29, 1949, was signed?

A. Basically it was the same story. The characterization was changed a little bit, one or two of the characters.

(Testimony of Polan Banks.)

Mr. Gang: Thank you very much. You may cross-examine.

Cross-Examination

By Mr. Knupp:

Q. Mr. Banks, I understand that you are the author of the novel "Carriage Entrance"?

A. Yes.

Q. Have you written other novels or plays or other literary work?

A. Yes, I have written nine other books and many stories.

Q. And your activities principally have been in the literary field? A. Yes, sir.

Q. Had you ever acted as producer of a motion picture? A. No, sir, not before this.

Q. So that, what you were doing in this instance was your first effort in that field?

A. That's correct, sir. [236]

Q. At that time you had, I assume, no practical experience in the way of the production of pictures or in the casting of pictures or any of the details that enter into the production of a motion picture?

A. Not in actual practice, in one sense, but in another sense I had been around the studios for 15 or 20 years as a writer around sets and offices.

Q. But in the actual experience of having done those things, that you never had? A. No, sir.

Q. For that reason, I understand, or at least that was one of the reasons the studio assigned Mr. Sparks to assist as a producer along with you in this picture?

(Testimony of Polan Banks.)

A. Well, not specifically. In a sense that is true, and in another sense it is not, because of this: My original deal was discussed there with Mr. Tefler. I was told, which I believe is true, that all RKO "A" pictures, top pictures, have an executive producer as well as the regular producer of the picture. Also when I made the deal originally it was to have been an independent picture releasing through RKO, and because of my inexperience in the past they were going to put a liaison man from the front of the studio on to work with me. As I understood it and my memory serves me, in our original deal he was to have no title whatsoever, but then when the details were worked out it was [237] decided that the so-called executive producer, which is put on ordinary RKO pictures, would serve in that capacity. Later when my contract was changed, in other words, when the independent contract was changed to RKO buying the package outright I became an employee of RKO as a normal producer and an executive producer was placed over me as was done in the other pictures.

Q. You negotiated the original deal by which Miss Sheridan was to appear as the female star in this picture? A. Yes, sir.

Q. With whom did you negotiate that deal?

A. With Miss Sheridan herself.

Q. Did you have any negotiations in that respect with Andrew Hickox?

A. Well, the actual negotiations, what you might call the important negotiations as to the contract,

(Testimony of Polan Banks.)

took place with subordinates in the office of Loyd Wright, Miss Sheridan's attorney. Mr. Hickox was present as Miss Sheridan's business manager at every meeting I attended. Later after the deal was put together and Miss Sheridan went to Europe to do another picture all the contacts I had entirely were with Mr. Hickox.

Q. Who at that time was her business manager?

A. Yes.

Q. Was any consideration given to Mr. Hickox by you [238] personally for his services on behalf of Miss Sheridan in this negotiation?

A. Would you mind explaining that a little bit, sir?

Q. I beg your pardon?

A. Would you mind explaining that question a little bit?

Q. Was there any consideration which you paid to Mr. Hickox for his services as business manager of Miss Sheridan in negotiating this picture?

A. Yes, sir, there eventually was, but not at the beginning of the deal. After Miss Sheridan went to Europe.

Q. What was that?

A. The consideration that we eventually arrived at after a meeting, and this was when I had it as an independent picture releasing through RKO, was that Mr. Hickox was to get 10 per cent of the producer's net profits for acting as liaison man with Miss Sheridan.

(Testimony of Polan Banks.)

Q. And did he actually receive anything for his services?

A. He received eventually from me \$5,000 cash.

Q. You say that the screen play was rewritten by Marion Parsonnet, Mr. Banks. In what shape was the script at the time Mr. Parsonnet went to work?

A. We had a completed script by Leopold Atlas, which I paid for myself, and that had been after another couple of [239] writers had worked on it. In other words, when I sold my package to RKO I sold my commitment, my services as a producer, and a complete shooting script. The studio decided of their own volition to rewrite the script.

Q. You are sure now, Mr. Banks, that the script which Mr. Atlas had written was complete? The reason I ask that, frankly, is that I had some information that two-thirds of the script had been written and the rest of the story, the action was merely indicated.

A. You may be right about that, sir. Come to think of it I think it was partly unfinished. I am not sure, however, because I haven't looked at the script or seen it for a very long time. But that is quite possible.

Q. You are not in position to say that you did have a completed script at the time you sold the package?

A. No, but the script was complete enough, there was enough of it there, meaning more than two-thirds of the script as I remember it.

(Testimony of Polan Banks.)

Q. You think practically two-thirds of the script?

A. To anybody in the business who knows stories, any executive or producer, or anybody else, you can tell from one-third or one-quarter of a script, if you have the complete outline of a story, and then enough of the script to show how skilled the writer is who is doing it. It was only a matter of detail finishing the rest of the script. In the rewriting [240] of the script later the studio did the characterizations, it was radically changed.

Q. In this rewriting of the script by Mr. Parsonnet were you consulted? A. Yes, I was.

Q. As a matter of fact, you and Mr. Parsonnet worked very closely together, didn't you, on the rewriting of this script? A. Yes, we did.

Q. What in your judgment was the result of Mr. Parsonnet's rewriting?

A. I thought we had a very competent script?

Q. Particularly with respect to this character, Mark Lucas, did you feel that the rewriting of the script had lessened or had increased the worth of that character?

A. As a matter of fact, it had increased his stature, because it was one of the original weaknesses of the original story, that the male lead needed building up.

Q. So when the rewriting was completed by Mr. Parsonnet and you, you felt that the character, Mark Lucas, was more worthy of the talents of

(Testimony of Polan Banks.)

some of these leading men than it had been theretofore?

A. Yes, I believe I can say that truthfully.

Q. You assumed, I think you said, Mr. Banks, that at the time this deal was made at RKO that the picture was all [241] ready to go into photography, that is to say, you had a script which was at least two-thirds finished, you had an engagement with Miss Sheridan to play the leading female part, and you had or thought you had an engagement with Mr. Robert Young to play the leading male role?

A. That is correct, yes, sir.

Q. And Miss Sheridan had approved any one of three directors?

A. Yes, sir.

Q. All of whom would possibly be available?

A. Yes, sir.

Q. So at that time you assumed that the production was one upon which RKO could immediately engage?

A. Yes, sir.

Q. And as far as you determined at the studio was that the general feeling there, everybody, that you were handing them or selling them a package with which they could immediately engage in the production of a picture?

A. Yes, sir; I think our first noticeable snag came when we learned that Robert Young didn't want to do the script.

Q. As far as you were able to determine from the conversations that you had or heard at the studio, that was as much of a surprise to everybody there at the studio as it was to you?

(Testimony of Polan Banks.)

A. About Mr. Young? [242]

Q. Yes. A. Yes, sir.

Q. It was generally assumed that Mr. Young would do the part and there would be no difficulty about it? A. Yes, sir.

Q. And as far as you knew it was contemplated that the picture would start shortly after the time when the script was submitted to Mr. Young? That I say to you was on July 11th.

A. Yes, sir. As a matter of fact——

Q. July 7th.

A. In fact, as I remember, we had hoped to start it even a month before that.

Q. After Mr. Young had indicated that he would not do the part, did you make any effort to secure his services in the role? A. Mr. Young?

Q. Yes.

A. I tried to reach Mr. Young through my agent, I had already talked to him originally about the script, and he had left town, he had gone up to his ranch up in northern California somewhere, and my agent informed me that he definitely did not want to do the script under its new guise.

Q. When you speak of your agent you mean Mr. Goldstone?

A. Yes, who also happens to be the agent for Mr. Young. [243]

Q. So in these conversations you had with Mr. Goldstone he was representing both you and Mr. Young? A. Yes, sir.

Q. What conclusion did you reach, Mr. Banks, from these conversations with respect to the pos-

(Testimony of Polan Banks.)

sibility of securing the services of Mr. Young in this role?

A. At that particular time, sir?

Q. Yes, at that particular time, after your talks with Mr. Goldstone.

A. I reached the conclusion that it would probably be impossible to get him, to make him change his mind.

Q. Do you know whether anybody at the studio made any effort to induce Mr. Young to change his mind? A. That I do not know, sir.

Q. Did you talk to Mr. Sparks about any conversations he may have had with Mr. Goldstone in an effort to induce Mr. Young to change his mind?

A. I don't remember specifically, sir.

Q. I think you said that shortly after this notice was received from Mr. Young in which he indicated his disapproval you set about trying to find someone else to play the part, is that correct?

A. Yes, sir.

Q. And those efforts consisted of conversations with Miss Sheridan? [244]

A. And Mr. Sparks.

Q. Mr. Sparks. And who else was present at those conversations?

A. Well, whenever Miss Sheridan was present Mr. Hickox was present with her.

Q. That is Miss Sheridan's business manager?

A. Yes, sir.

Q. And commencing at the time you started on these efforts to secure another leading man and

(Testimony of Polan Banks.)

continuing until the contract with Miss Sheridan was terminated, was Mr. Hickox present on every occasion at the studio when Miss Sheridan was present?

A. To the best of my recollection, yes.

Q. I mean, of course, when you were present, too?

A. To the best of my recollection, yes.

Q. I think you said in answer to one question by Mr. Gang that you discovered in going through the casting directory, or the volume which contained the names of the men who might be available, that there were a limited number of leading men who might be available for this part?

A. Yes, sir.

Q. Do you recall just what you did ascertain in that respect about the number of possibilities for this part that there might be?

A. Do you mean the names, sir? [245]

Q. Yes, by going through the names.

A. Well, as I remember it, the upshot of our conversations, Mr. Sparks and my own, and whoever else was with us at the time, was that it was limited to roughly about five or six people.

Q. And did those five or six people include the names of Ryan, Ferrer, Preston, and Basehart?

A. Yes, sir.

Q. Why did you conclude that the number of men who might be available was so limited?

A. First of all, as is generally known in the industry, leading men are pretty hard to get any-

(Testimony of Polan Banks.)

way, most of the ones that would fit this particular part were either under contract to other studios or were working at the moment, at the time we wanted them for the picture, which I believe Mr. Sparks had already ascertained through the casting office if I remember rightly, and it eventually worked out that there was something like five or six men that we were pretty sure could be gotten for it.

Q. That you thought might do for the part?

A. That might be possible.

Q. Yes. I think you mentioned that during some of these conversations the name of Mr. Basehart was mentioned?

A. Yes, sir.

Q. And Miss Sheridan said that he was too young for the [246] part?

A. I believe so, sir.

Q. And I think you said you agreed with her in that respect?

A. I think I did, sir.

Q. And you said that the name of Conte was mentioned?

A. Yes, it was.

Q. Did you say whether Miss Sheridan approved or disapproved Conte?

A. I frankly don't remember at this moment specifically whether she did approve or disapprove of him.

Q. If she approved of him you have no recollection of it at the present time?

A. No.

Q. Was the name of Preston mentioned?

A. Yes, the name of Preston was mentioned, and Miss Sheridan didn't like him at all for the part, and I happened to agree with her on it.

(Testimony of Polan Banks.)

Q. What did Miss Sheridan say about Preston, if you recall?

A. To the best of my recollection she didn't think that he was fitted for the role as she saw it.

Q. And you saw Wendell Corey in a picture?

A. Yes, we did.

Q. At Paramount? [247] A. Yes, sir.

Q. What did Miss Sheridan say about him?

A. As I remember, she said she couldn't see him at all as Dr. Quentin.

Q. And did you indicate whether or not you were in agreement with her in that respect?

A. As it happens, I was, yes.

Q. Did you see anybody else who might have been mentioned for the part in any pictures?

A. We also discussed Mel Ferrer and Robert Ryan.

Q. What did Miss Sheridan say with respect to Mel Ferrer?

A. I remember very distinctly the first time when we saw the picture "Lost Boundaries" she said she thought he was a very fine actor and had given a very fine performance in that picture, but she simply couldn't see him as Dr. Quentin in the picture. I happened to agree with her on that.

Q. What part did Mel Ferrer play in that?

A. He played the part of a Negro who passed as a white man.

Q. A Negro doctor?

A. I think he was a doctor. I am not sure. He was some sort of professional.

(Testimony of Polan Banks.)

Q. What was said with respect to Robert Ryan?

A. In regard to Robert Ryan Miss Sheridan didn't like him at all. I disagreed with her. I liked him. I didn't [248] think he was perfect for the part, but I thought of everybody available that he could very well do it, and I expressed myself to that extent.

Q. Did you urge on Miss Sheridan that she should accept Robert Ryan in the part?

A. I did at one time, yes.

Q. And you felt personally with Ryan in the part the picture would have been successful?

A. I felt that he would have been competent for it.

Q. Tone, as I understand it, was mentioned first in the conversation in the office of Mr. Sparks?

A. Yes, sir.

Q. Did you have any conversation with respect to Mr. Tone playing the part other than that conversation in the office of Mr. Sparks when he was first mentioned?

A. I believe that Mr. Sparks and I discussed him once or twice, we didn't think he would be perfect for the part.

Q. How soon after that was it that you determined that the studio was not agreeable——

A. Very, very shortly. If I remember rightly, I may be wrong on this, but I think it was within the next couple of days.

Q. So within two or three days after Tone was first mentioned for the part it was definitely known

(Testimony of Polan Banks.)

that the studio would not propose to put him [249] in? A. I believe so, sir.

Q. Do you recall when Mr. Mitchum's name first came up in connection with this role?

A. It first came up, as I believe I testified a little while ago, when Miss Sheridan asked me if it was possible to get Mr. Mitchum for the part, and that I spoke to, as I said before, I spoke to Mr. Rogell about it, and Rogell said it would be practically impossible because he was tied up in another picture and still another one to follow.

Q. Mr. Rogell told you at the time, did he not, Mr. Banks, what picture Mr. Mitchum was then appearing in?

A. Yes; I believe it was "Christmas Holiday," or something like that.

Q. "Christmas Holiday"? A. Yes.

Q. Did he tell you what picture Mr. Mitchum was slated to appear in following that?

A. "Jet Pilot."

Q. And because of these two commitments it would be impossible for Mr. Mitchum to appear in this picture?

A. That is what Mr. Rogell told me, yes.

The Court: Did you think Mitchum was O. K. for the picture?

The Witness: Yes, sir, I do, sir.

Q. (By Mr. Knupp): Do you recall a conversation that was [250] had with respect to the name of Charles Boyer? A. Vaguely, sir.

Q. Do you know when the conversation concerning Mr. Boyer came up?

(Testimony of Polan Banks.)

A. It was toward the last of the days that we were discussing people, we had almost given up hope on almost everyone else, and I don't remember exactly who proposed Mr. Boyer, but I think it was put up to Miss Sheridan, and she said she would accept Mr. Boyer if he were available.

Q. What did you think about Mr. Boyer as a northern doctor in this picture?

A. I didn't think he could do the northern doctor, exactly, but I did agree with someone's comment that the part could be changed making him a Creole, that he could very well—the story as you probably know was laid in New Orleans.

Q. Yes.

A. (Continuing): And the character could have been changed to a Creole instead of Bostonian.

Q. If the character had been rewritten?

A. If it had been rewritten, yes.

Q. When, if you recall, did Miss Sheridan see a certain script in which certain of these actors had appeared?

A. Would you mind qualifying that question, sir?

Q. Were there occasions upon which Miss Sheridan was shown script in which some of these actors appeared? [251]

A. Do you mean footage, sir?

Q. Pardon me. I mean film.

A. That is what confused me.

Yes, sir, there were.

Q. How many of such occasions were there when

(Testimony of Polan Banks.)

you were personally present, Mr. Banks?

A. I think three that I remember. That might have included the one with Wendell Corey. I know of two. We saw "Lost Boundaries" and I think another occasion with Mr. Sparks we saw some short footage, and then the third time on August 16th.

Q. Your present recollection is that the first film you saw was "Lost Boundaries"?

A. Yes, sir.

Q. And who appeared in that?

A. Mel Ferrer.

Q. How much of that did you see?

A. We saw the whole picture.

Q. Where did you see it?

A. In the projection room at RKO.

Q. Who was present?

A. Miss Sheridan, Mr. Hickox, Mr. Sparks, myself. I don't remember whether anyone else was with us, or not.

Q. Was it after Miss Sheridan had seen that film that she made the remark that she couldn't see Mr. Ferrer in the [252] part? A. Yes.

Q. What was the next film that you saw in which any of these actors appeared?

A. I think it was on the same occasion, if I am not mistaken, I think we saw parts of "Bed of Roses."

Q. What actors appeared in that?

A. Both Robert Ryan and Mel Ferrer were in that.

(Testimony of Polan Banks.)

Q. Do you recall what character Ryan played in "Bed of Roses"?

A. I think, I am not sure, but I think he played a philandering artist. I am not sure of that.

Q. Do you recall who had the leading female role in that? A. Yes. Joan Fontaine.

Q. You are acquainted with the work and talent of Miss Fontaine, I assume?

A. Yes, very well.

Q. She is, in your opinion, one of the leading ladies in the motion picture business?

A. Yes, sir.

Q. And worthy, I suppose, of the co-operation of some suitable leading men in any picture that she appears in? A. Yes, sir.

Q. Do you recall what part Ferrer played in that picture, [253] "Bed of Roses"?

A. I don't remember actually. I remember it only hazily, because I didn't see the whole picture. But I know he had an important role in it. At least the footage that I saw.

Q. How much footage of that picture did you see?

A. I don't remember how many reels, sir. It wasn't too much.

Q. You didn't see all the picture?

A. No, sir.

Q. And why didn't you see all the picture?

A. It wasn't run for us.

Q. Did Miss Sheridan indicate that she didn't

(Testimony of Polan Banks.)

want to see any more, or were you only to look at certain scenes?

A. I frankly don't remember that.

Q. Was Mr. Hickox present on this occasion?

A. Yes.

Q. I think you said he was present on all these occasions?

A. Yes, sir, he was.

Q. When was the next occasion when you saw any film at the studio?

A. I don't remember exactly whether there was another occasion between that occasion and August 16th or not. I have the impression that we did see some more film, but I [254] couldn't swear to that.

Q. Do you recall that on one occasion after you saw some film at the studio Miss Sheridan and Mr. Hickox went to the office of Mr. Rogell?

A. Yes, I do, sir.

Q. Do you remember what film it was that you saw on that occasion?

A. I think one was with Robert Ryan, and I don't remember what it was but I remember Robert Ryan was in it, and one was Bob Preston, I think, in a western, part of a western. We just saw some short footage of both.

Q. Have you ever seen the "Macomber Affair," I mean the picture entitled "Macomber Affair" with Robert Preston?

A. Not the whole picture.

Q. Did you see any part of the "Macomber Affair" on that date?

(Testimony of Polan Banks.)

A. Now that you remind me by the title, I think we did see the "Macomber Affair."

The Court: How much longer will you be, Mr. Knupp?

Mr. Knupp: Fifteen or twenty minutes, if the court please.

The Court: We will take a recess. Mr. Banks, have you ever been a witness before in court?

The Witness: No, sir.

The Court: Well, I don't think I have ever seen a court [255] room scene that was realistic, so I will look with interest to your next book, and possibly one of these days we will find a writer who will draw court rooms as they actually exist in this country.

Ladies and gentlemen of the jury, the court admonishes you of your duty not to converse or otherwise communicate among yourselves or with anyone else upon any subject touching the merits of this cause, and you are not to form or express any opinion on the case until it is finally submitted to you for your verdict. We will take a short recess.

(A recess was taken.)

The Court: Stipulated that the jurors are present and in their proper places?

Mr. Gang: Yes, sir.

Mr. Knupp: So stipulated, if the court please.

Q. (By Mr. Knupp): Mr. Banks, when you concluded these efforts to secure a leading man for the picture "Carriage Entrance," and immediately preceding the time that the contract with Miss

(Testimony of Polan Banks.)

Sheridan was terminated, did you feel that you had pretty thoroughly canvassed the field of available leading men for the part?

Mr. Gang: I regret to object, as calling for the witness' feelings. They are subjective and I don't think they are material. I have no objection to his answering what they had done, but his feelings in the matter I don't think [256] are material.

Mr. Knupp: I don't think it is subjective at all. I am asking the question based upon what he knew of those available and what they had done about securing one who was available.

The Court: Read the question, please.

(The question was read by the reporter.)

The Court: Objection sustained.

Q. (By Mr. Knupp): I mean based upon what you had determined with respect to the available leading men and the efforts that had been made to secure one of such men.

A. I think, yes, sir, that we did about cover the field pretty thoroughly.

Q. And of those that might be available whom did you consider to be the most capable for this role? A. Robert Ryan.

The Court: Now, just a minute. When you say "those available," who do you consider as being available when you say Ryan was the most eligible one?

The Witness: I mean, your Honor, that among—I believe it was five, five people that we under-

(Testimony of Polan Banks.)

stood were available and were offered to Miss Sheridan.

The Court: Which ones were the five that were available when you said Ryan was the best choice?

The Witness: As I remember, Ryan, Mel Ferrer, Robert [257] Preston, John Lund, I think it was, Richard Basehart, and Wendell Corey.

Q. (By Mr. Knupp): May I suggest the name of Robert Preston? A. I mentioned that.

The Court: You exclude Tone, Mitchum, Boyer and Conte as being available?

The Witness: Yes, sir. Tone wasn't available because we were informed almost immediately by the New York office that they didn't want him. Mitchum I knew wasn't available because Mr. Rogell said he was tied up with two other commitments.

The Court: Go ahead.

Q. (By Mr. Knupp): When you saw these pictures at the studio on August 16th, Mr. Banks, did you have some conversation with Mr. Hickox?

A. Yes, I did, sir.

Mr. Gang: May I ask the court to find out if this was in the hearing of Miss Sheridan, and if not I shall ask that the question not be answered before I have an opportunity of objecting on the ground that it was outside the hearing of Miss Sheridan, as previously testified to on cross-examination by Miss Sheridan.

Mr. Knupp: I don't think the question whether Miss Sheridan was present is material at all, if the

(Testimony of Polan Banks.)

court please. [258] The gentleman to whom Mr. Banks was talking was her business manager and accompanied her on all these occasions, all these conferences. I think the relationship is such that we are entitled to have anything admitted that was done with her business manager.

Mr. Gang: Does the court wish it argued in the presence of the jury?

The Court: This is a legal argument and I am sure it will not affect the jury. Proceed.

Mr. Gang: At this time I ask if I might take over the witness on this point on voir dire.

The Court: Let's assume that it appears that Miss Sheridan was not present, isn't Mr. Knupp's argument good, isn't the situation similar to conversation with agents of the defendant?

Mr. Gang: There is a big difference between an agent and lawyer and a business manager. That is just the reason that I insisted on that distinction being observed. The witness himself has testified on cross-examination that his business dealings and the decision there—that his dealings were made with Miss Sheridan, not with Mr. Hickox; that all the arrangements were made with the lawyers for Miss Sheridan at Loyd Wright's office, and not Mr. Hickox. He was just present. He also testified that he employed Mr. Hickox to work for him and paid him \$5,000. So it seems to me no [259] foundation has been laid on any theory by which anything that Mr. Banks and Mr. Hickox talked about outside the presence of Miss Sheridan can be said to be

(Testimony of Polan Banks.)

binding upon her, and I object to any questions or conversations on that ground, your Honor.

The Court: Well, you haven't mentioned it, but isn't it outside the scope of your direct examination? You never inquired about this particular conversation.

Mr. Gang: That is correct. And thanks to your Honor for reminding me, I renew my objection and include that ground as well.

Mr. Knupp: If the court please, so far as relationship between Miss Sheridan and Mr. Banks is concerned, I think it appears that Mr. Hickox accompanied Miss Sheridan and negotiated in her behalf on all of these occasions commencing in July with the first visit that they made until this time. I think it is also clear that he was her business manager and——

The Court: But doesn't it also appear that he was acting for Mr. Banks also?

Mr. Knupp: No, it does not, if the court please. Mr. Banks said that when he made this deal with Mr. Hickox he paid him \$5,000. It doesn't appear that he was acting for Mr. Banks; it appears he was acting in behalf of Miss Sheridan. [260]

The Court: What do you say as to this matter of the scope of your cross-examination?

Mr. Knupp: If the court please, counsel has gone into these visits. If he assumes to omit one visit that he wants to omit, I think the scope of the examination is certainly not limited. He himself has gone into the question of Miss Sheridan having

(Testimony of Polan Banks.)

seen these pictures. I think we are entitled to bring out everything that went on at that time. We can't be limited simply because he didn't go into these matters.

The Court: Well, I don't think that is the rule. I think that the rule on the scope of cross-examination is such that a man may not open up certain subjects by direct examination and rely upon a ruling of the court that other counsel may not go into it in cross.

I am not so sure that the record shows this. Even if the record showed a visit or something that was done, but nothing said, and no questions were asked about what was said, I would question your right to cross-examine on the conversation.

I will sustain the objection on the ground that it is not proper cross-examination.

Mr. Knupp: That is subject to our right to recall Mr. Banks, then, if the court please. That concludes our cross-examination.

The Court: Do you want Mr. Banks to remain in attendance [261] or merely be on call?

Mr. Knupp: I want him to remain in attendance, if the court please.

The Court: You may step down. Do you have any questions?

Mr. Gang: I have a few questions, Mr. Banks.

Redirect Examination

By Mr. Gang:

Q. You stated on cross-examination, Mr. Banks,

(Testimony of Polan Banks.)

that when you talked to Mr. Rogell about Robert Mitchum he said that he was then engaged in a picture, "Christmas Holiday"? A. Yes, sir.

Q. Did he tell you when that would finish?

A. I don't remember the dates that were specifically mentioned, but he did mention, if I remember correctly, that "Jet Pilot" was due to start, and he mentioned a date and I forgot the date of that, too, but it was very shortly thereafter.

Q. To your knowledge has "Jet Pilot" ever been made by RKO to this day?

A. I know they started production on it when I left California last year.

Q. When?

A. I left here last February, and it was in production then. [262]

Q. In 1950? A. Yes.

Q. And it is a fact that Mr. Mitchum after finishing "Christmas Holiday" did not go directly into "Jet Pilot"?

A. No, because by that time he was in "Carriage Entrance" and John Wayne was put in "Jet Pilot" in his place.

Q. So he never did appear in "Jet Pilot"?

A. No.

The Court: Were both pictures made by the same studio?

The Witness: Yes, sir.

Q. (By Mr. Gang): Can you tell us what the characteristics of the Dr. Quentin part were so as to guide you in looking for suitable leading men?

(Testimony of Polan Banks.)

A. First of all, he was the hero, which would mean that he would have to be physically attractive both to the leading woman, presumably, and to the audience. He would have to be a handsome man. In connection with this particular story he was a scientist, a doctor, so he had to have some bearing, some personality. I think at the moment that is about all I could answer to that question.

Q. Was the character one that required some sensitivity in physical appearance, as well as emotion?

A. Not necessarily. I have known doctors and scientists who look like football players sometimes.

Q. I am talking about this particular character, Dr. [263] Quentin. A. Not particularly.

The Court: Somewhere in the evidence there was some talk that there was supposed to be some characteristic of weakness.

The Witness: We said, your Honor, in regard to that, not in his character so much as the character is drawn; he wasn't as strong in ratio to the heroine as he should have been, the part was a little smaller than it should have been.

The Court: I misunderstood. In other words, in comparison with the leading lady's part it was a weaker part, but there was to be no characteristic of weakness in his character?

The Witness: No characteristic of weakness in his character, no.

Q. (By Mr. Gang): Was there some necessity for a relationship between the two men, the part

(Testimony of Polan Banks.)

played by Melvyn Douglas and the part of Dr. Quentin, which required consideration?

A. Yes, there had to be some contrast as in all pictures.

Q. You say the man should have been physically handsome? A. Preferably, yes.

Q. Do you remember the "Macomber Affair" when you looked at it? [264]

A. Frankly, I don't.

Q. Did Mr. Preston have four days of whiskers on him?

A. I think I saw Mr. Preston in a Western.

Q. Do you remember what he looked like?

A. I remember what he looked like, yes.

Q. Did he have four days of whiskers, if you remember, on that occasion?

A. He was whiskered, yes.

Q. You said you agreed with Miss Sheridan in her opinion as to the suitability of Mel Ferrer, or unsuitability, rather? A. Yes.

Q. Did you talk to Mr. Sparks about that?

A. Yes, I believe I said so in Mr. Sparks' presence.

Q. What did he say?

A. Mr. Sparks—let me think now. As to the unsuitability, you say?

Q. Yes. A. I don't remember, frankly.

Q. You don't remember whether he disagreed with you or Miss Sheridan?

A. I don't remember exactly what he said.

Q. You also testified on cross-examination that

(Testimony of Polan Banks.)

you agreed with Miss Sheridan that Mr. Preston was not suited for this particular part? [265]

A. Yes.

Q. You discussed that with Mr. Sparks?

A. Yes, I think I did.

Q. And can you remember whether he agreed or disagreed?

A. I believe if my memory serves me correctly, I believe Mr. Sparks agreed with me.

Q. Would the same thing be true about Wendell Corey?

A. That I don't specifically remember Mr. Sparks' reaction to.

Q. What do you remember was Mr. Sparks' reaction when you said you agreed with Miss Sheridan about Richard Basehart?

A. I don't believe Mr. Sparks was there at the time that conversation took place.

Q. Did you discuss it with him at any other time?

A. Not that I remember.

Q. I think you answered the judge when he asked you if you thought Mr. Mitchum was suitable for the part, you said yes.

A. Yes, I think he was.

Q. Do you think he was more suitable than Mr. Ryan?

A. After having seen him in the picture, I think yes, that he was more suitable.

Q. You stated in response to a question that the search for leading men was concluded. Did you

(Testimony of Polan Banks.)

mean by that that you [266] stopped looking for leading men at any time, Mr. Banks?

A. No, we were continually, Mr. Sparks and I, delving or—I can't think of the right verb at the moment, but trying to search our minds, trying to think of a leading man that might possibly be available for the role.

Q. On that particular point, after you discussed with Mr. Sparks the news that you had read in the paper on Friday, August 19th, did you discuss with Mr. Sparks any further search for a leading man for the picture?

A. No, because as far as we knew, as I remember it, that date we didn't know what was going to happen to the picture.

Q. You kept on with your work, as you said on direct, you kept on working on the story?

A. After a few days had passed, I don't remember exactly what the conversations were, but my general memory, understanding of what happened was that Mr. Sparks suggested that we continue working on the script until something happened, until we heard from above. At that time nobody knew what was going to happen.

Q. Your best recollection now is how long after August 19th were you informed that Mr. Mitchum and Miss Gardner would appear?

A. Roughly, if I remember rightly, I think around the 1st of September. [267]

Q. In other words, around 10 days afterwards, is that right?

(Testimony of Polan Banks.)

A. No, I am wrong. I think it must have been about two weeks afterwards, because I know I went through a period of being rather worried whether we would get anybody.

Q. You testified on cross-examination that your original dealings with reference to Miss Sheridan in "Carriage Entrance" were directly with her?

A. Yes, they were.

Q. Was Mr. Hickox present when you talked to Miss Sheridan?

A. When the original deal was made?

Q. Yes. A. No.

Q. You made that original deal directly with her?

A. I made the original deal directly with Miss Sheridan at her home in the valley.

Q. It was with reference to playing in "Carriage Entrance"? A. Yes.

Q. And it concerned the amount of money she would get? A. Yes.

Q. And the percentage of the profits she would get, is that right?

A. Yes, I think we talked about that. I am not sure [268] whether we went that much into detail.

Q. Did she then tell you to take the matter up with her lawyers? A. Yes, Loyd Wright.

Q. Did she say who her lawyers were?

A. Yes, Loyd Wright.

Q. Did you subsequently take the matter up with Loyd Wright?

(Testimony of Polan Banks.)

A. Yes, that is when I met Mr. Hickox for the first time in Mr. Loyd Wright's office.

Q. In negotiations with reference to the contract the matters were taken up by you or your attorneys with Mr. Loyd Wright's office?

A. More or less.

Q. When you say that, what do you mean?

A. By that I mean when any question came up about the contract itself my attorneys handled it, they were in touch themselves with Loyd Wright's office.

Q. On matters of script and story, would you take it up yourself?

A. I took it up with Miss Sheridan directly until she went abroad.

Q. And arrangements with Miss Sheridan were made either with Miss Sheridan or her attorneys?

A. Either directly with Miss Sheridan, or after she [269] went abroad, at her direction, with Mr. Hickox.

Q. With whom? A. With myself.

Q. With reference to what?

A. Miss Sheridan went abroad to make a picture for Twentieth-Century Fox, "I Was a Male War Bride," and that changed our plans production-wise, and at the time I remember we discussed the matter of dates, as to approval she had as to script, certain date approvals, and I asked her how I would get the decisions in time, and she said she would be in contact, that her business manager was in constant contact with her, and she would send all news to him through her cables to him.

(Testimony of Polan Banks.)

Q. He was her liaison between you and her?

A. Yes.

Q. After the contract of April 29, 1949, was signed, your dealings were with Miss Sheridan?

A. When she was in town I had discussions with her, but most of the telephone calls were made by Mr. Hickox for her.

Q. You would call him to get in touch with her, is that right? A. Yes.

Q. Any decisions that were made in your discussions were made by Miss Sheridan, is that right?

A. As I understand it, all major decisions were always [270] made by Miss Sheridan.

Q. She never told you that Mr. Hickox could make any decisions for her?

A. Not that I remember, no.

Mr. Gang: That is all.

Mr. Knupp: Just a moment.

Recross-Examination

By Mr. Knupp:

Q. Mr. Banks, you said you met Mr. Hickox at Mr. Loyd Wright's office. In what connection did you first meet him?

A. When I went to Loyd Wright's office to discuss the first option agreement I was to get on Miss Sheridan's services.

Q. And for what purpose was Mr. Hickox there?

A. To inform, I imagine, the Loyd Wright office as to what terms Miss Sheridan wanted.

Q. He was there as Miss Sheridan's representative, was he not? A. Yes.

(Testimony of Polan Banks.)

Mr. Gang: Just a minute. I object to that as calling for a conclusion of the witness as to what he was there as.

Q. (By Mr. Knupp): Did he tell you what he was there for?

The Court: Objection sustained to the other question.

Q. (By Mr. Knupp): Did he tell you what he was there [271] for?

A. No, sir. All I knew was that he was representing Miss Sheridan.

Mr. Gang: I ask that be stricken.

Mr. Knupp: I think, if the court please, if he was there pretending to be a representative of Miss Sheridan's this witness could certainly testify to that. He was there for some purpose. This witness ought to know what he did or what he represented as to why he was there.

The Court: We would have to have what he said and did.

Q. (By Mr. Knupp): What did Mr. Hickox do during those negotiations in Mr. Wright's office?

A. That was the time that Miss Sheridan was leaving unexpectedly for Europe, and she had apparently told him her wishes as to minor details in the contract.

Q. You say she had told him her wishes; how do you know she had told him her wishes?

A. He informed us of that in the office.

Q. And did he suggest during that interview

(Testimony of Polan Banks.)

various terms should be incorporated in the contract?

A. Yes, he made various suggestions and objections.

Q. After April 29th, did you have any communications with Mr. Hickox in connection with this matter?

A. Do you mean after we were in the studio?

Q. Yes, after the contract had been made. [272]

A. Yes, I had a number of conversations with Mr. Hickox.

Q. What matters did you discuss with Mr. Hickox?

A. They were all minor things as to when Miss Sheridan was coming on the lot, when the picture would start, discussions as to the leading man, various small matters.

Q. At all times when Miss Sheridan came on the lot was it pursuant to some arrangement that had been made with Mr. Hickox? A. Yes.

Q. Mr. Hickox was always present at those discussions? A. Yes, he was.

Q. Did he express any opinion as to the availability or the capabilities of any of these actors who were suggested?

A. Yes, he did at various times.

Q. Did he offer any advice to Miss Sheridan in your presence with respect to what he thought of these different actors who were offered for the role?

A. Yes, I believe he did a couple of times just in general conversations.

(Testimony of Polan Banks.)

Q. As a matter of fact, Mr. Hickox always expressed himself to Miss Sheridan as to what he thought about these different people, didn't he?

A. Yes, he always spoke freely. [273]

Mr. Knupp: I think that is all, if the court please.

The Court: Now, you may step down, but remain in attendance pursuant to Mr. Knupp's request.

Mr. Gang: If it please the court, the plaintiff rests.

Mr. Knupp: I understand there is one other matter.

Mr. Gang: Yes. I did want to mention it. The resting is subject to Mr. Knupp's phone call.

Mr. Knupp: Before the plaintiff rests, I would like to, if I might, recall Miss Sheridan for just two or three questions.

Mr. Gang: I have no objection.

The Court: Miss Sheridan, will you return to the witness stand?

ANN SHERIDAN

called as a witness in her own behalf, having been previously sworn, was examined and testified further as follows:

Further Cross-Examination

By Mr. Knupp:

Q. Miss Sheridan, you know Andrew Hickox?

A. Yes, sir.

(Testimony of Ann Sheridan.)

Q. How long have you known him?

A. About 14 years.

Q. Has he represented you in any capacity during that period of time? [274]

A. Not represented me, no.

Q. Has he been employed by you?

A. Employed by me, yes.

Q. In what capacity has he been employed?

A. To make out my checks, to handle my insurance, things like that.

Q. He was employed as your business manager, wasn't he?

A. Yes, if that is what the term means, business manager.

Q. In connection with these appointments that you made at RKO when you were seeking to arrive at a conclusion as to a leading man, who made those appointments for you, generally speaking?

A. Sometimes Mr. Hickox, sometimes I did. If they couldn't get in touch with me they called him.

Q. And was Mr. Hickox present with you on all occasions when you went to the studio?

A. Yes, sir.

Q. Did you confer with him with respect to the suitability of these men who were proposed for the leading role?

A. If you mean was he in the conversations, yes.

Q. And did he express his opinion as to the suitability of these men? A. Yes.

Q. Mr. Hickox was paid, I assume, a regular monthly [275] salary for the services that he ren-

(Testimony of Ann Sheridan.)

dered to you? A. That's right.

Mr. Knupp: I think that is all.

Mr. Gang: No questions.

The Court: You got off easy, Miss Sheridan. That is all; step down.

Do you want to take another 15 minutes of testimony, or how long is the defendant's case going to take?

Mr. Knupp: Well, I imagine it will take a couple of days, if the court please. I think this other matter really involves the question whether Mr. Gang has completed his case or not, does it not?

Mr. Gang: I have completed it subject to your phone call.

Mr. Knupp: I mean the question of whether there may be an additional witness has to be determined, the one you want to call.

The Court: Couldn't he be called out of order?

Mr. Gang: If he is available it may be taken out of order.

The Court: Have you stipulated he may be taken out of order if he arrived?

Mr. Knupp: It is perfectly all right with me, if the court please, if that arrangement is satisfactory with Mr. Gang. [276]

Mr. Gang. It certainly is.

The Court: Well, then, I think that is the sensible way to handle that. So plaintiff rests?

Mr. Gang: Yes. [277]